103 JACKSON LIBRARY - UNCG
3 0510 1610155 S

For Building Use Only

The Woman's College of
The University of North Carolina
Library

KFN
7445
N6
v.103

NORTH CAROLINA REPORTS.

VOL. 103.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA.

FEBRUARY TERM, 1889.

REPORTED BY

THEODORE F. DAVIDSON.

(Vol 12.)

RALEIGH:

JOSEPHUS DANIELS, STATE PRINTER AND BINDER.

PRESSES OF EDWARDS & BROUGHTON.

1889.

~~NG~~
KFN
7445
N6
V.103

JUSTICES

OF THE

Supreme Court of North Carolina,

FEBRUARY TERM, 1889.

CHIEF JUSTICE:

WILLIAM N. H. SMITH.

ASSOCIATE JUSTICES:

AUGUSTUS S. MERRIMON, JOSEPH J. DAVIS,
ALPHONSO C. AVERY, JAMES E. SHEPHERD.

ATTORNEY GENERAL:

THEODORE F. DAVIDSON.

CLERK OF THE SUPREME COURT:

THOMAS S. KENAN.

MARSHAL OF THE SUPREME COURT:

ROBERT H. BRADLEY.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA.

GEO. H. BROWN, Jr.,	1st District.	JAMES C. MACRAE,	7th District.
FREDERICK PHILIPS,	2d "	R. F. ARMFIELD,	8th "
HENRY G. CONNOR,	3d "	JESSE F. GRAVES,	9th "
WALTER CLARK,	4th "	JOHN GRAY BYNUM,	10th "
JOHN A. GILMER,	5th "	WILLIAM M. SHIPP,	11th "
E. T. BOYKIN,	6th "	JAS. H. MERRIMON,	12th "

SOLICITORS.

JOHN H. BLOUNT,	1st District.	FRANK MCNEILL,	7th District.
GEORGE H. WHITE,	2d "	BENJAMIN F. LONG,	8th "
D. WORTHINGTON,	3d "	THOMAS SETTLE,	9th "
THOMAS M. ARGO,	4th "	W. H. BOWER,	10th "
ISAAC R. STRAYHORN,	5th "	FRANK I. OSBORN,	11th "
OLIVER H. ALLEN,	6th "	JAMES M. MOODY,	12th "

CRIMINAL COURTS.

FOR NEW HANOVER AND MECKLENBURG COUNTIES.

Hon. OLIVER P. MEARES, Judge.....Wilmington.
BENJAMIN R. MOORE, Esq. (New Hanover), Solicitor.....Wilmington.
W. R. FRENCH (New Hanover), Clerk.....Wilmington.
JOHN E. MOORE, Esq. (Mecklenburg), Solicitor.....Charlotte.
T. R. ROBERTSON (Mecklenburg), Clerk.....Charlotte.

FOR BUNCOMBE COUNTY.

Hon. CHARLES A. MOORE, Judge.....Asheville.
E. D. CARTER, Esq., Solicitor.....Asheville.
J. R. PATTERSON, Clerk.....Asheville.

108075

CASES REPORTED.

PAGE.

Adrian v. McCaskill 182
Allen v. Salinger 14
Allen, Powell v. 46
Allen, State v. 433
Alexander, Scroggs v, ... 162
Armfield v. Colvert 147
Asheville, Moffitt v. 237
Askew v. Askew 285

Baker v. Brem 72
Barnard, Conant v. 315
Barber, Gibson v. 322
Berry, Perkins v. 131
Bear, Jaffray v. 165
Bell, State v. 438
Blackwell v. Dibbrell 270
Blue, Woodard v. 109
Boone v. Lewis 40
Bowden, Edwards v. 50
Brem, Baker v. 72
Brown v. Ward 173
Brown v. Brown 213, 221
Bracco, State v. 349
Bryant, State v. 436
Bryan, Jordan v. 59

Campbell, State v. 344
Chancey v. Powell 159
Comron v. Standland 207
Conant v. Barnard 315
Cook v. Patterson 127
Colvert, Armfield v. 147
Crawley, State v. 353
Currie, Fry v. 203

Davenport v. Terrell 53
Dibbrell, Blackwell v. 270
Douglass, Wallace v. 19

PAGE.

Edwards v. Bowden 50
Ellington v. Ellington 54
Erdmann, Millhiser v. 27

Farrar, State v. 411
Flaum v. Wallace 296
Frederick v. Williams 189
Fry v. Currie 203

Giles v. Hunter 194
Gibson v. Barber 322
Giles, State v. 391
Goldston, State v. 323

Harding v. Long 1
Hall v. Tillman 276
Hargrave, State v. 328
Hardin v. Ledbetter 90
Hill v. Hilliard 34
Hilliard, Hill v. 34
Hinson, State v. 374
Holman v. Miller 118
Houston, State v. 383
Hunter, Giles v. 194

Jacobs, State v. 397
Jaffray v. Bear 165
Jones v. Wilson 13
Jordan v. Bryan 59
Jones, Rice v. 226

Koonce v. Russell 179
Koonce, Stephens v. 266

Lambeth, Thornton v. 86
Lewis, Boone v. 40
Ledbetter, Hardin v. 90
Long, Harding v. 1
Lowman, Warlick v. 122
Lyle v. Siler 261

Manufacturing Co., McLaughlin v. 100
Martin, Ryan v. 282
Massey, State v. 356
McMahan, State v. 379

	PAGE.
McCoury, State v.	352
McLaughlin v. Manufacturing Co.	100
McCaskill, Adrian v.	182
Miller, Holman v.	118
Millhiser v. Erdmann	27
Moffitt v. Asheville	237
Nichols, State v.	439
Oakley, State v.	408
Parker v. Sutton	191
Patterson, Cook v.	127
Perkins v. Berry	131
Plonk, Warlick v.	81
Powell, Chancey v.	159
Powell v. Allen	46
Powell, State v.	424
Rice v. Jones	226
Russell, Koonce v.	179
Ryan v. Martin	282
Salinger, Allen v.	14
Scroggs v. Alexander	162
Siler, Lyle v.	261
Smith, State v.	403
Smith, State v.	410
Spivey, Whitehead v.	66
Standland, Comron v.	207
State v. Allen	433
State v. Bell	438
State v. Bryant	436
State v. Bracco	349
State v. Campbell	344
State v. Crawley	353
State v. Farrar	411
State v. Giles	391
State v. Goldston	323
State v. Hargrave	328
State v. Hinson	374
State v. Houston	383
State v. Jacobs	397
State v. Massey	356
State v. McMahan	379

PAGE.

State v. McCoury 352
State v. Nichols 439
State v. Oakley 408
State v. Powell 424
State v. Smith 403
State v. Smith 410
State v. Stovall 416
State v. Tow 350
State v. Ward 419
State v. Walker 413
State v. Weddington 364
State v. Wilkerson 337
Stephens v. Koonce 266
Stovall, State v. 416
Sutton, Parker v. 191

Terrell, Davenport v. 53
Thornton v. Lambeth 86
Tillman, Hall v. 276
Tow, State v. 350
Tucker v. Tucker 170

Wallace v. Douglass 19
Warlick v. Lowman 122
Warlick v. Plonk 81
Ward, Brown v. 173
Wallace, Flaum v. 296
Walker, State v. 413
Ward, State v. 419
Weddington, State v. 364
Whitehead v. Spivey 66
Williams, Frederick v. 189
Wilkerson, State v. 337
Wilson, Jones v. 13
Woodard v. Blue 109

CASES CITED.

Adams v. Reeves	68 N. C., 134	265
Adcock v. Marsh	8 Ired., 360	376
Arrington v. Bell	94 N. C., 247	313
Atkinson v. Whitehead	77 N. C., 418	396
Avery v. Strother	Conf. R., 434	216, 219
Barcroft v. Roberts	91 N. C., 363	38
Barnhart v. Smith	86 N. C., 473	158
Barnawell v. Threadgill	5 Ired. Eq., 86	320
Baker v. Robinson	63 N. C., 191	188
Bank v. Lutterloh	95 N. C., 495	188
Bethea v. Byrd	95 N. C., 309	204
Bell v. Clark	9 Ired., 239	43
Black v. Justice	86 N. C., 504	201
Blount v. Parker	78 N. C., 128	167
Borden v. Thomas	6 Ired., 209	176
Brink v. Black	77 N. C., 59	335
Branton v. O'Briant	93 N. C., 99	377
Braddy v. Hodges	99 N. C., 319	382
Branch v. Houston	Busb., 85	272
Briggs v. Morris	1 Jones' Eq., 194	7
Brady v. Parker	4 Ired. Eq., 430	7
Breden v. McLaurin	98 N. C., 307	58
Burton v. Spiers	87 N. C., 87	70, 293
Burgwyn v. Lockhart	1 Winst., 269	124
Bunch v. Edenton	90 N. C., 431	260
Bumpass v. Chambers	77 N. C., 357	266
Burbank v. Commissioners	92 N. C., 257	49
Bynum v. Commissioners	101 N. C., 412	50
Campbell v. McArthur	2 Hawks, 33	58
Caroon v. Doxey	3 Jo., 23	124
Caroon v. Cooper	63 N. C., 386	293
Cheatham v. Hawkins	80 N. C., 161	402
Clayton v. Rose	87 N. C., 106	160
Clendenin v. Turner	96 N. C., 416	50
Clemmons v. Drew	2 Jones' Eq., 314	7
Clark v. Cameron	4 Ired., 161	272
Coates v. Wilkes	92 N. C., 376	231

		PAGE.
Coates v. Wilkes	94 N. C., 174	231
Commissioners v. Commissioners	75 N. C., 240	265
Council v. Averett	90 N. C., 168	281
Costin v. Baxter	7 Ired., 111	129
Cowand v. Meyers	99 N. C., 198	320
Crowell v. Kirk	3 Dev., 355	43
Creecy v. Pearce	69 N. C., 67	293
Curtis v. Cash	84 N. C., 41	65
Currie v. Kennedy	78 N. C., 91	181
Day v. Howard	73 N. C., 1	160
Davis v. Perry	89 N. C., 420	161
Davis v. Morgan	64 N. C., 570	187
Deans v. Dortch	5 Ired. Eq., 331	7
Devereux v. Devereux	81 N. C., 12	206
Deaver v. Commissioners	80 N. C., 116	336
Dobson v. Murphy	1 D. & B., 586	58
Donnell v. Cooke	63 N. C., 227	266
Dougherty v. Sprinkle	88 N. C., 300	304
Egerton v. Logan	81 N. C., 172	167, 168
Elliott v. Logan	Phil. Eq., 163	168
Ely v. Early	94 N. C., 1	6, 202
Episcopal Church v. Newbern Academy	2 Hawks, 233	58
Falls v. Gamble	66 N. C., 455	275
Fisher v. Carroll	6 Ired. Eq., 485	7
Fickey v. Merrimon	79 N. C., 585	182
Frazier v. Brownlow	3 Ired. Eq., 237	306, 311
Flynt v. Bodenhamer	80 N. C., 205	377
Frederick v. Williams	*ante*	189
Frick v. Hilliard	95 N. C., 117	212
Garrison v. Cox	95 N. C., 353	264
Gay v. Stancill	76 N. C., 369	275
Gibson v. Barber	100 N. C., 192	322
Glover v. Flowers	101 N. C., 134	50
Grant v. Hughes	96 N. C., 177	182
Harker v. Arendell	74 N. C., 85	280
Hardy v. Holly	84 N. C., 661	313
Havens v. Potts	86 N. C., 31	334
Hammond v. Schiff	100 N. C., 161	158, 341

		PAGE.
Hampton v. Wilson	4 Dev., 468	376
Harrison v. Howard	I Ired. Eq., 407	7
Harrison v. Hoff	102 N. C., 25	14
Hampton v. Hardin	88 N. C., 592	43
Hayes v. Nixon	69 N. C , 108	172
Hayes v. Davidson	70 N. C., 573	181
Halstead v. Mullen	93 N. C., 252	126, 204
Haywood v. Daves	81 N. C., 8	206
Harmon v. Grizzard	99 N. C., 161	206
Harris v. Burwell	65 N. C., 584	186, 334
Hackett v. Shuford	86 N. C., 144	201
Harding v. Long	*ante*, 1	202
Hemphill v. Hemphill	99 N. C., 436	7
Hicks v. Bullock	96 N. C., 164	58
Hill v. Shields	81 N. C., 250	186
Hill v. Wilton	2 Murph., 14	58
Hill v. Charlotte	72 N. C., 55	255, 257
Holly v. Holly	94 N. C., 639	413
Holly v. Holly	96 N. C., 229	69, 413
Holly v. Perry	94 N. C., 30	211
Holden v. Peace	4 Ired. Eq., 223	158
Hoke v. Henderson	3 Dev., 12	58
Horton v. Horne	99 N. C., 219	281
Huntley v. Whitney	77 N. C., 392	304
Hunter v. Kelly	92 N. C., 285	58
Insurance Co. v. Davis	74 N. C., 78	280
Intendent and Commissioners of Raleigh v. Sorrell	1 Jo., 49	418
Isler v. Isler	88 N. C., 576	178
Isler v. Harrison	71 N. C., 64	275
Jarrett v. Self	90 N. C., 478	275
Jordan v. Knox	5 Jones' Eq., 175	306
Jones v. Mial	82 N. C., 252	321
Joiner v. Massey	97 N. C., 148	38
Johnson v. Finch	93 N. C., 205	126
Kemp v. Earp	7 Ired. Eq., 167	7
Knott v. Burwell	96 N. C., 272	376
Kramer v. Electric Light Co	95 N. C., 277	50
Latham v. Rollins	72 N. C., 454	49
Lea v. Pearce	68 N. C., 77	4, 10

		PAGE.
Lea v. Johnston	9 Ired., 15	124
Leggett v. Glover	71 N. C., 211	156
Lewis v. Raleigh	77 N. C., 229	256, 260
Lewis v. Rountree	81 N. C., 20	206
Lippard v. Troutman	72 N. C., 551	161
Livingston v. Farish	89 N. C., 140	63
Loftin v. Loftin	96 N. C., 194	7
Love v. Johnston	72 N. C., 415	181
Lovinggood v. Burgess	Busb., 407	216
Manix v. Howard	82 N. C., 125	49, 281
Marsh v. Scarboro	2 Dev. Eq., 551	266
Manning v. Elliott	92 N. C., 48	130
Martin v. Richardson	68 N. C., 255	186
McCoy v. Lassiter	95 N. C., 88	212
McCanless v. Reynolds	74 N. C., 301	156
McDonald v. Cannon	82 N. C., 245	49
McLeod v. Bullard	84 N. C., 515	6
McRae v. Malloy	87 N. C., 196	269
McCurry v. McCurry	82 N. C., 296	376
McDougald v. Coward	95 N. C., 368	376
Meares v. Wilmington	9 Ired., 73	254
Mebane v. Patrick	1 Jo., 23	160
Meroney v. Avery	64 N. C., 312	155
Mitchell v. Sawyer	71 N. C., 70	181
Moore v. Cameron	93 N. C., 51	402
Moore v. Ivey	8 Ired. Eq., 192	7
Muller v. Commissioners	89 N. C., 171	418
Myers v. Beeman	9 Ired., 116	233
Newsom v. Buffalow	1 Dev. Eq., 379	7, 11
Newell v. March	8 Ired., 441	265
Nelson v. Evans	1 Dev., 9	375
Old v. Old	4 Dev., 500	43
Ormond v. Moye	11 Ired., 564	233
Overcash v. Kitchie	88 N. C., 384	19
Page v. Branch	97 N. C., 97	17, 58
Parker v. McDowell	95 N. C., 219	194
Patapsco Mfg. Co. v. Magee	86 N. C., 350	269
Perry v. Tupper	71 N. C., 385	49
Pearce v. House	2 Hay., 386	58
Peacock v. Stott	90 N. C., 518	156

		PAGE.
Pearce v. House	Term Reps., 722	191
Pippen v. Wesson	74 N. C., 437	307, 304
Pickett v. Pickett	3 Dev., 6	58
Plummer v. Baskerville	1 Ired. Eq., 252	7
Ponton v. Griffin	72 N. C., 362	233
Pool v. Allen	7 Ired., 120	265
Pool v. Lewis	75 N. C., 417	90
Pugh v. Wheeler	2 D. & B., 50	107
Purnell v. Vaughan	82 N. C., 134	130
Railroad v. Reidsville	101 N. C., 404	89
Railroad Co. v. Davis	2 D. & B., 451	107
Rawlings v. Hunt	90 N. C., 270	212
Ransom v. McCless	64 N. C., 17	320
Redmond v. Stepp	100 N. C., 212	53
Reddick v. Leggat	3 Murph., 539	58
Reynolds v. Flynn	1 Hay., 123 (106)	216
Riggan v. Green	80 N. C., 236	57
Rountree v. Gay	74 N. C., 447	307
Sawyer v. Sawyer	93 N. C., 321	120
Scott v. Timberlake	83 N. C., 382	80
Scott v. Kenan	94 N. C., 296	89
Scroggs v. Stephenson	100 N. C., 354	164
Seawell v. Bunch	6 Jo., 195	160
Shields v. Whitaker	82 N. C., 516	9
Shuler v. Bryson	65 N. C., 201	233
Singer Mfg. Co. v. Barrett	95 N. C., 36	411
Simonton v. Lanier	71 N. C., 498	130
Sigmon v. Hawn	87 N. C., 450	178
Smith v. McDonald	95 N. C., 163	172
Smith v. Headrick	93 N. C., 210	204
Smith v. Ingram	7 Ired., 175	106
Smith v. Kron	96 N. C., 392	378
Smiley v. Pearce	98 N. C., 185	9
Sowers v. Sowers	87 N. C., 303	376
Spence v. Tapscott	92 N. C., 576	412
Spruill v. Sanderson	79 N. C., 466	168
Spillman v. Williams	91 N. C., 483	263
Spoon v. Reid	78 N. C., 244	70
State v. Allen	*ante*, 433	432
State v. Alexander	76 N. C., 231	386
State v. Arrington	3 Murph, 571	326
State v. Banks	Phil., 577	346

		PAGE.
State v. Bennett	75 N. C., 305	395
State v. Bland	97 N. C., 438	382
State v. Bowman	78 N. C., 509	261
State v. Brown	100 N C., 519	378
State v. Britt	78 N. C., 439	395
State v. Bray	89 N. C., 480	409
State v. Bryan	83 N. C., 611	397
State v. Bryson	81 N. C., 595	355
State v. Bryan	(Present term)	355
State v. Butts	91 N. C., 524	413
State v. Burgess	74 N. C., 272	435
State v. Canan	94 N. C., 880	405
State v. Caldwell	2 Jones, 469	438
State v. Clark	7 Jones, 167	326
State v. Copeland	86 N. C., 694	64
State v. Cole	94 N. C., 958	377
State v. Crossett	81 N. C., 579	355, 403
State v. Crook	91 N. C., 536	411
State v. Curtis	1 Hay., 471	382
State v. Custer	65 N. C., 339	358
State v. Dancy	83 N. C., 608	324
State v. Davis	63 N. C., 578	378
State v. Davis	82 N. C., 610	397
State v. Deal	64 N. C., 270	427
State v. Divine	98 N. C., 778	89
State v. Dixon	101 N. C., 741	334
State v. Durham	72 N. C., 447	326
State v. Ellen	68 N. C., 281	403
State v. Ellick	2 Winst., 36	5
State v. Fisher	3 Ired., 111	402
State v. Lee	92 N. C., 756	435
State v. Glen	7 Jo., 321	105
State v. Gould	90 N. C., 658	372
State v. Hall	97 N. C., 474	255
State v. Halifax	4 Dev., 345	407
State v. Hanks	66 N. C., 612	403
State v. Hairston	63 N. C., 451	114
State v. Hardison	75 N. C., 203	434
State v. Hause	71 N. C., 518	403
State v. Howard	82 N. C., 623	422
State v. Jacobs	94 N. C., 950	438
State v. James	80 N. C., 370	382
State v. Jenkins	78 N. C., 478	434
State v. Jesse	2 D. &. B., 297	325

		PAGE.
State v. Jones	93 N. C., 617	351
State v. Jones	82 N. C., 685	288, 435
State v. Johnston	76 N. C., 209	324
State v. Johnston	93 N. C., 559	413
State v. Joyner	81 N. C., 534	418
State v. Kemp	87 N. C., 538	341
State v. Kennedy	15 N. C., 251	114
State v. Kent	65 N. C., 311	361
State v. King	86 N. C., 603	402
State v. Long	78 N. C., 571	359
State v. Lawrence	97 N. C., 492	414
State v. Martin	3 Dev. 329	325
State v. McDowell	93 N. C., 541	413
State v. McIntyre	3 Ired., 171	382
State v. McNair	93 N. C., 628	423
State v. McNinch	90 N. C., 695	382
State v. McNair	1 Jones, 180	415
State v. Mills	2 Dev., 420	438
State v. Moore	82 N. C., 659	325
State v. Muse	4 D. & B., 319	418
State v. Narrows Island Club	109 N. C., 477	108
State v. Parish	83 N. C., 613	395
State v. Parish	Busb., 239	341
State v. Payne	83 N. C., 612	351
State v. Payne	86 N. C., 609	6
State v. Perkins	82 N. C., 681	326
State v. Phifer	65 N. C., 321	334
State v. Pollok	4 Ired., 305	438
State v. Purify	86 N. C., 681	124
State v. Putney	Phil. Law, 543	360
State v. Ramsey	78 N. C., 448	401, 403
State v. Ross	76 N. C., 242	114
State v. Rogers	94 N. C., 860	361
State v. Russell	91 N. C., 624	325
State v. Scott	72 N. C., 461	325
State v. Secrest	80 N. C., 451	341
State v. Sowls	Phil., 151	427
State v. Speaks	94 N. C., 865	382
State v. Stalcup	2 Ired., 50	382
State v. Sutton	100 N. C., 474	359
State v. Tow	*ante*, 350	352
State v. Upchurch	7 Ired., 454	326
State v. Vanentine	7 Ired., 225	389
State v. Vann	82 N. C., 631	5

		PAGE.
State v. Vaughan	91 N. C., 532	411
State v. Voight	90 N. C., 741	402
State v. Walker	10 Ired., 234	438
State v. Whitfield	92 N. C., 831	423
State v. Wise	66 N. C., 120	359
State v. Williams	97 N. C., 455	359
State v. Winslow	95 N. C., 649	355
State v. Wilkerson	98 N. C., 696	334
State v. Wood	94 N. C., 855	405
State v. Young	76 N. C., 258	342
Stout v. McNeill	98 N. C., 1	89
Strother v. Cathey	1 Murph., 162	219, 221, 220
Summerlin v. Cowles	101 N. C., 473	57
Taylor v. Taylor	1 Jones Eq., 246	7
Tate v. Southard	3 Hawks, 119	58
Tatem v. White	95 N. C., 453	382
Temple v. Williams	4 Ired. Eq., 39	201
Thompson v. Thompson	1 Jones, 430	292
Thompson v. Newlin	3 Ired. Eq., 338	319
Threadgill v. Commissioners	99 N. C., 352	258
Turner v. Holden	94 N. C., 70	231
Tuttle v. Harrill	85 N. C., 456	275
Vest v. Cooper	68 N. C., 131	54
Vegelahn v. Smith	95 N. C., 254	231
Walker v. Dicks	80 N. C., 263	80
Ward v. Willis	6 Jo., 183	106
Warner v. Railroad Co	94 N. C., 250	126
Watson v. Dodd	72 N. C., 240	206
Wilson v. Land Co	77 N. C., 445	7
Williams v. Hodges	95 N. C., 32	9
Withrow v. Biggerstaff	82 N. C., 82	17
Winslow v. Weith	66 N. C., 432	49
Williams v. Washington	1 Dev. Eq., 137	80
Williams v. Helme	1 Dev. Eq., 151	80
Williams v. Weaver	94 N. C., 134	120
Wilson v. White	80 N. C., 280	168
Withers v. Sparrow	66 N. C., 169	307
Wooley v. Robinson	7 Jo., 30	129
Wright v. Wilmington	92 N. C., 156	254
Yancy v. Greenlee	90 N. C., 317	19
Yates v. Yates	81 N. C., 397	275

ERRATA, VOL. 102.

BOARD OF EDUCATION *v.* BATEMAN.

On page 58, line 12, for "County Treasurer" read "Treasurer of the County Board of Education."

On page 58, line 14, strike out "as Treasurer of the County Board of Education."

SPENCER *v.* CREDLE.

On page 77, line 2, for "allotment" read "attachment."

BRIDGERS *v.* TAYLOR.

On page 90, line 19, for "final" read "first."

PUCKETT *v.* ALEXANDER.

On page 97, line 12, for "constitutes" read "constitute."

HARRISON *v.* HOFF.

On page 128, line 9, for "*ante*" read "decided at this term."

JONES *v.* BRITTAIN.

On page 179, line 12 from bottom, insert after the word "estates" a comma, and the word "estates."

On page 180, line 3 from bottom, for "exempted" read "excepted."

On page 184, line 2, strike out the word "after."

On page 188, line 5, for "would" read "could."

LEWIS *v.* LONG.

On page 207, line 3 of opinion, insert "and" between the words "England" and "America."

EMRY *v.* RAILROAD.

On page 227, bottom line, insert "by" between the words "least" and "showing."

On page 232, line 9, insert "the" between the words "to" and "common law."

HUGHES *v.* HODGES.

On page 239, line 14 of opinion, for "beneficial" read "beneficent."

On page 240, line 15, for "creation" read "creature."

On page 242, line 2, insert between the words "homestead" and "afterwards" the words, "which allotment was made, estopped the creditor from selling the homestead."

On page 246, line 2, for "has" read "lays."

On page 248, last line, for "creation" read "creature."
On page 249, lines 23 and 24, for "has" read "had."
On page 251, line 24, strike out "debt in."
On page 263, line 3 from bottom, for "Spear v. Reed" read "Spoon v. Reid, 78 N. C., 244."

BROWN *v.* MITCHELL.

On page 271, line 15, for "find" read "finding."
On page 374, line 1, for "Battle v. Maysant, S. E. Reporter," read "Battle v. Mayo, post, 413."

FARRELL *v.* RAILROAD.

On page 399, line 5 from bottom, for "this" read "his."
On page 400, line 13 from bottom, insert "and" after the word "particular"; and after "Fuller," in line 9, insert a *comma* in the place of a *period*, and substitute a small w in the succeeding word "we."

MOFFITT *v.* MANESS.

On page 463, line 5, for "decision" read "decisions;" and in line 6, for "establishes" read "establish."

WINFREE *v.* BAGLEY.

On page 516, line 9 of opinion, read "used" for "made."

BERRY *v.* HENDERSON.

On page 528, line 3 from bottom, for "probably" read "properly."

ERRATA, VOL. 103.

HARDING *v.* LONG.

On page 6, line 13, for "never" read "more."
On page 10, line 23, for "working" read "marking."

WALLACE *v.* DOUGLASS.

On page 22, line 6 from bottom, for "repeated" read "reported."

BOONE *v.* WALLACE.

On page 44, line 22, for "prevent" read "pervert"; and for "cause" read "course."

POWELL *v.* ALLEN.

On page 49, line 2, for "operative" read "put in operation."

DAVENPORT *v.* TERRELL.

On page 53, last line, the word "But" should begin the paragraph, and the preceding line and a half read with the paragraph above.

HILL *v.* HILLIARD.

On page 39, line 1, insert after the word "mortgage" the words "is entitled to have the prior mortgage."

HOLMAN *v.* MILLER.

On page 120, line 7 from bottom, for "whenever" read "wherever."

COOK *v.* PATTERSON.

On page 128, line 6 from bottom, for "Davis, J." read "Avery, J." Mr. Justice Avery delivered the opinion of the Court in this case.

JAFFRAY *v.* BEAR.

On page 167, line 17, omit the word "also."
On page 167, line 19, for "these" read "there."

COMRON *v.* STANDLAND.

On page 211, line 2 from bottom, insert between the words "mule" and "revest" the words "were to."

BROWN *v.* BROWN.

On page 219, line 7 from bottom, for "opposite" read "apposite."
On page 222, line 15, before the word "the" insert "nor to."

RICE *v.* JONES.

On page 235, line 2, for "debts" read "debt."
On page 235, line 13 from bottom, for "on" read "or."
On page 235, line 14 from bottom, for "the" read "its."

MOFFITT *v.* ASHEVILLE.

On page 260, line 9 from bottom, between the words "every" and "necessary" insert the word "thing."

LYLE *v.* SILER.

On page 263, line 3 of the opinion, insert the word "it" between the words "that" and "seems."

STATE *v.* GOLDSTON.

On page 325, last line, after the word "treated" insert "as."

STATE *v.* HARGRAVE.

On page 335, line 9, substitute the word "to" for "of" after the word "assignment."

STATE *v.* WILKERSON.

On page 343, line 23, between the words "to" and "the" insert the word "show."

On page 343, line 24, for "cause" read "case."

On page 343, line 24, for "the fact" read "that part."

STATE *v.* CAMPBELL.

On page 348, line 12 from bottom, for "Cr. Law" read "Cr. Ev."

On page 348, line 11, for "Cr. Com." read "Cr. Cases."

STATE *v.* MASSEY.

On page 358, lines 9 and 11, for "repugnancy" read "repugnance."

On page 359, line 7 from bottom, for "of" read "under."

STATE *v.* WEDDINGTON.

On page 368, line 6 from bottom, insert between the words "the" and "certificate" the word "original."

STATE *v.* POWELL.

On page 427, line 1 of opinion, for "was" read "is."

On page 428, line 12, for "rim" read "run."

STATE *v.* ALLEN.

On page 435, line 24, before the word "there" insert the word "That" and begin a new paragraph.

CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

AT RALEIGH.

FEBRUARY TERM, 1889.

G. B. HARDING and T. R. HARDING v. JOHN LONG et al.

Fraud, Undue Influence and Mistake—Evidence to Establish Fraud—Judge's Charge on Issues of Fraud, Mistake, &c.

1. The rule governing the *quantum* and quality of proof required to sustain allegations of fraud, undue influence and mistake, in the execution of written instruments, and to establish resulting trusts, is as follows: (1) In cases in which relief is sought on the ground of mutual mistake, mistake of one party and fraud on the part of the other, or that a deed was drawn by mistake an absolute deed, when it was intended as a mortgage or deed of trust, or it is sought to establish a resulting trust, based on a verbal agreement to buy for another, or to set up a lost deed, in all these cases such allegations, of the party seeking the relief, as are necessary to show his right to it, *must be established by clear and convincing proof; and evidence dehors the deed and inconsistent with it must be shown.* (2) But where it is sought to have a deed declared void

because its execution was obtained by false and fraudulent representations or undue influence, or because it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud *must be proven so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury.*

2. The rule as above stated is perfectly consistent with all of the decisions of this Court. The cases of *Lea* v. *Pearce* and *Ely* v. *Early* are consistent, and both are affirmed.

3. Where the issue was, whether a deed had been obtained from the bargainor by fraud and undue influence practiced by the bargainees, it was error to instruct the jury that the bargainor must establish the fraud, &c., by such proof as would satisfy the jury "beyond all reasonable question."

This was a SPECIAL PROCEEDING FOR DOWER, begun before the Clerk of the Superior Court of YADKIN County, transferred to the Superior Court in term for trial, and tried before *Philips, J.*, and a jury, at Spring Term, 1889, of Yadkin Superior Court.

There was a verdict and judgment in favor of the plaintiffs, and the defendants appealed.

The defendant Mary E. Harding had executed a deed for her unassigned dower in the lands of her deceased husband, to the plaintiffs, who were his brothers, for the consideration of two hundred and seventy-five dollars. When the plaintiffs asked, before the Clerk in this proceeding, to have dower assigned to them as her grantees, in her husband's land, she answered that the plaintiffs, her brothers-in-law, had her confidence, and, taking advantage of her distress immediately after her husband's death, made false and fraudulent representations as to the condition of his estate, especially the probable value of her dower after selling the land to satisfy a debt, secured by mortgage thereon, and thereby induced her to execute said deed.

The following issue was submitted to the jury:

"Was the deed described in the petition of the plaintiffs obtained from the defendant Mary E. Harding through fraud or undue influence on the part of plaintiffs?"

In support of the affirmative of this issue, the defendant Mary E. Harding introduced testimony tending to show fraud and undue influence by representations made by the plaintiffs, her brothers-in-law, that the estate of her husband would be worth very little after the payment of debts.

Plaintiffs introduced testimony to the contrary.

The other material facts are stated in the opinion.

Mr. J. B. Batchelor, for the plaintiffs.

Messrs. A. E. Holton and *W. B. Glenn*, for the defendants.

AVERY, J. (after stating the facts). We think that the Judge who tried the case erred in instructing the jury as to the measure of testimony required to establish the allegation, that the execution of the deed had been procured by fraud or undue influence.

Defendant asked the Court to instruct the jury:

"That if the price paid by the plaintiffs was so inadequate as to amount to apparent fraud, or the situation of the parties so unequal as to give the plaintiffs the opportunity of making their own terms, that the burden rests on the plaintiffs to show that the transaction was fair, and that there was no fraud or undue influence."

The Court charged the jury as follows:

"The defendant Mary E. Harding claims that the deed executed was obtained from her by the fraudulent misrepresentations of the plaintiffs, and that advantage was taken of her situation and distress consequent upon the recent death of her husband.

"The plaintiffs claim that she acted voluntarily, with a full knowledge of her rights and what she was doing; that no fraudulent misrepresentations were made or fraudulent

and controlling influence was exercised to induce her to make the deed. Mere inadequacy of price alone is no ground for setting aside the deed executed by Mary E. Harding. Fraud or undue influence must be proved, and the burden is upon the defendant Mary E. Harding, who seeks to set aside the deed, to satisfy the jury, by clear, strong and convincing proof, that fraudulent misrepresentations were made or a fraudulent and controlling influence was exercised, to induce her to make the deed which she would not otherwise have made.

"Unless the jury are so satisfied beyond all reasonable question, they must answer the issue, 'No.'

"If it does so satisfy them, they will answer, 'Yes.'

"If the jury find that she acted voluntarily, with a full knowledge of her rights and what she was doing, they will answer the issue, 'No.'

The jury, after consideration, answered the issue, "No."

In order to give proper effect to the words "so satisfied," we must consider the instruction as if the language used had been the following: "Unless the jury are satisfied, beyond all reasonable question, that the fraudulent representations were made, or a fraudulent and controlling influence was exercised, to induce her to make the deed, which she would not otherwise have made, they must answer the issue, 'No.'"

In *Lea* v. *Pearce*, 68 N. C., 77, it was held by this Court to be error to instruct a jury that fraud must be proven beyond a reasonable doubt in order to justify a verdict finding fraud. In the opinon, Chief Justice PEARSON, for the Court, says: "It is very questionable, whether this formula, which has been acted upon, in the trial of capital cases, has answered any useful purpose; *but it has never been extended to civil actions.* The rule is, if the *evidence creates in the minds of the jury a belief that the allegation is true, they should so find.*"

The facts in that case were that the plaintiffs alleged that one of the defendants, taking advantage of the friendly and confidential relations subsisting between him and the relator under whom the plaintiffs claimed, fraudulently induced her to sign a deed conveying her land to the other defendant, his wife.

Here the *feme* defendant's brothers-in-law are charged with having abused her confidence, and induced her to convey her dower interest. There is no sufficient allegation, in either case, that the relations were such as to raise a presumption in law of fraud, so as to shift the burden and require the party charged with the fraud to rebut it by satisfactory evidence.

The issue in that cause, as in this, was, under the former practice, cognizable only in a court of equity. We are unable to draw any distinction between "proving beyond reasonable doubt" and "beyond reasonable question," unless we treat the latter expression as the stronger of the two. One of our leading lexicographers defines question to mean (in such connections as that in which it appears in the charge of the Judge) "doubt"; another, "dispute"; so, if the former definition be adopted, the words are synonymous; if the latter be correct, it may be that there is still room for dispute when the doubt, that lingers in the mind, is no longer within the domain of sound reason.

The rule, that the evidence must be sufficient to produce belief in the minds of the jury, that the allegation of fraud is true, in order to invalidate and set aside a deed, is equivalent to saying, that the fraud alleged must be proven to the satisfaction of the jury, or so as to satisfy the minds of the jury of their truth; and this has been declared by this Court to be very different in its import from proving a fact beyond a reasonable doubt. *State* v. *Ellick*, 2 Winston, 36; *State* v. *Vann*, 82 N. C., 631. In *State* v. *Vann*, Justice DILLARD, for the Court, says, in reference to testimony offered in behalf of a prisoner: "And in making such extenuating or acquitting

proofs, the law put on him the onus to do so, *not excluding all reasonable doubts, but merely* to the extent of *satisfying the jury.*" On the other hand, in *State* v. *Payne*, 86 N. C., 609, Justice ASHE delivering the opinion, after calling attention to the fact that, in *State* v. *Ellick*, the erroneous principle stated in *State* v. *Peter Johnson* had been overruled, and a defendant was no longer required to establish mitigating or justifying circumstances beyond a reasonable doubt, says further: "In it (referring to *State* v. *Ellick*) is corrected what we consider as erroneous in the decision of *Com.* v. *York*, that matters of excuse or extenuation, which the prisoner is to prove, must be decided according to the preponderance of evidence. *It is never correct to say, as we think, that they must be proved to the satisfaction of the jury.*"

The exact language used by the Court in *Lea* v. *Pearce*, *supra*, was adopted in the instruction given by the Court below in *McLeod* v. *Bullard*, 84 N. C., 515, and, being excepted to, was approved by this Court in overruling the exception. Counsel for the plaintiffs insisted that the rule laid down for this Court by Justice MERRIMON in *Ely* v. *Early*, 94 N. C., 1, as applicable where actions are brought to correct deeds, must govern this case.

The language used in *Ely* v. *Early*, and made the basis of instruction in this case, to which it was never intended to apply, was as follows:

"That the Court may, in the exercise of its equitable jurisdiction, correct a mistake in a deed or other written instrument, such as that alleged in the complaint, is not controverted; but it will do so only when the mistake is made to appear by clear, strong and convincing proof," &c.

Speaking of the deed, the Court say further: "In such cases the Court will not disturb the deed or other writing, and upon the strong ground that the parties have agreed to make the writing evidence between them, as to the matters contained in it. It must stand until, by a weight of proof

greater than itself, a court of equity, in the exercise of a very high and delicate jurisdiction, shall correct it." That action was brought by the plaintiff in part, to correct a deed, made by mutual mistake of the grantor and grantee, as alleged, and it will be observed that the Court, in express terms, lay down a rule, applicable only where parties ask the equitable relief of correcting a deed. There was no reason why the distinction should have been then drawn between the degree of proof, necessary in cases of that kind, and other causes involving an issue of fraud.

In *Loftin* v. *Loftin*, 96 N. C., 194, it was held that the evidence of the existence and loss of a deed, offered with a view of setting it up, must be clear and convincing. *Deans* v. *Dortch*, 5 Ired. Eq , 331; *Fisher* v. *Carroll*, 6 Ired. Eq., 485, and *Plummer* v. *Baskerville*, 1 Ired. Eq., 252, were cited to sustain the view of the Court.

In *Hemphill* v. *Hemphill*, 99 N. C., 436, this Court held that a deed, absolute upon its face, cannot be corrected so as to convert it into a trust, upon a mere preponderance of evidence, or without some facts *dehors* the deed, inconsistent with the idea of absolute ownership, but only upon such full proof as, in the old Court of Equity, would satisfy a Judge."

This view is sustained by a long line of cases in our own Court: *Briggs* v. *Morris*, 1 Jones' Eq., 194; *Taylor* v. *Taylor*, *ibid.*, 246; *Kemp* v. *Earp*, 7 Ired. Eq , 167; *Moore* v. *Ivey*, 8 Ired. Eq., 192.

The principle announced in *Ely* v. *Early* is fully sustained both by our own decisions and other authorities. *Harrison* v. *Howard*, 1 Ired. Eq., 407; *Brady* v. *Parker*, 4 Ired. Eq., 430; *Newsom* v. *Buffalow*, 1 Dev. Eq., 379; *Clemmons* v. *Drew*, 2 Jones' Eq., 314; *Wilson* v. *Land Co.*, 77 N. C., 445; *Burger* v. *Denkle*, 100 Pa. St. Reports, 113; Story's Eq. Jur., secs. 153 to 158; Pomeroy's Eq. Jur., secs. 858 and 859.

We search in vain among our own decisions, and counsel have referred to none, where proof so full and clear has been

required in order to establish the allegation, that the execution of a deed was procured by false and fraudulent representations in order to hinder, delay or defeat creditors, and the case of *Lea* v. *Pearce*, *supra*, which has been so often cited upon another point, is express authority to show that proof satisfactory to a jury is sufficient in such cases. We cannot agree that the line should be drawn so as to require convincing proof, in all cases heretofore exclusively cognizable in a court of equity. The weight of authority is against that view.

Bigelow, in his work on Fraud (p. 474, ch. 17, § 3) declares the rule to be as follows:

"It is not necessary for the evidence to *show beyond a reasonable doubt* that a *party is guilty* of fraud.

"It is settled law, that, upon a trial of a civil action in which the claim or defence is based on alleged fraud, the issue may be determined on the preponderance or weight of evidence, *except* in *cases* of *resulting trusts arising on verbal agreements* to *buy for another.*

"In other cases of fraud, nothing more is required than that the evidence should be *sufficient* to *satisfy the conscience of a common man*, although the evidence does not amount to absolute certainty. Evidence of fraud is not required to be more direct and positive than that of facts and circumstances, leading to the conclusion that it was committed. Hence, an instruction to the jury, that the fraud in question could not be proved by them except upon clear and undoubted proof of it, is erroneous."

The view of that author, that fraud may be proven by a mere preponderance of evidence, is supported by eminent text writers and other authority. Wait on F. C., 281; *Pointer* v. *Drew*, 40 Pa., 467; *Rea* v. *Missouri*, 17 Wallace, 532; *Clake* v. *White*, 12 Pel., 224.

We conclude, therefore, that the true rule, as far as our own adjudications have settled the question, is that, in order to get the aid of a Court to correct a deed, whether on the

ground of *mutual* mistake of one of the parties, and fraud on the part of the other, that it was drawn, by mistake, an absolute deed, when it was intended to be a mortgage or deed of trust, or to establish a resulting trust arising on a verbal agreement to buy for another, or to set up a lost deed, such allegations of the party seeking the relief, as are necessary to show his right to it, must be established by clear and convincing proof, and evidence *dehors* the deed, and inconsistent with it, must be shown in order to set up a parol trust, or have any deed reformed. *Williams* v. *Hodges*, 95 N. C., 32; *Smiley* v. *Pearce*, 98 N. C., 185; *Shield* v. *Whitaker*, 82 N. C., 516.

But, on the other hand, when the relief demanded by a party is, that a deed shall be declared void, because its execution was procured by false and fraudulent representations or undue influence, or that it was executed with intent to hinder, delay or defeat creditors, the allegations material to establish the fraud must be *proven, so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury.*

It may be that other cases will arise hereafter that will fall on the one side or the other of the line. This view of the case is perfectly consistent with all of the decisions of this Court.

Bump, in his work on Fraudulent Conveyances, pp. 562 and 563, says what is equivalent to the rule laid down by Chief Justice PEARSON: "If the evidence is admissible, as conducing in any way to the proof of the fact, *the only legal test applicable* to it, *upon such issue, is its sufficiency to satisfy the mind and conscience* and *produce* a *satisfactory conviction or belief.* What amount of weight of evidence is sufficient proof of a fraudulent intent, is not a matter of legal definition." It seems that the author expresses his view of the measure of testimony necessary to warrant a verdict on issues of fraud in language almost identical, and in words certainly

equivalently in meaning to the rule laid down by Chief Justice PEARSON in *Lea* v. *Pearce*, *supra*. The author says, subsequently, what still more strongly sustains our view: "It ss not necessary, however, that the fraud shall be proved beyond a reasonable doubt."

In Kerr on Fraud and Mistake, p. 382, we find that the author's view of the amount of evidence necessary to establish fraud is also expressed in language of the same import as that used in *Lea* v. *Pearce:* "Fraud will not be carried one tithe beyond the manner in which it is proved to the satisfaction of the Court." On page 384, the same author says: "It is not, however, necessary, in order to establish fraud, that direct affirmative or positive proof of fraud be given. In matters that regard the conduct of men, the certainty of mathematical demonstration cannot be expected or required. Like much of human knowledge on all subjects, fraud may be inferred from facts that are established." In a note to the foregoing paragraph, Bump says (p. 385, note): "This means no more than that the proof must be such as to *create belief*, and not merely suspicion. A rational belief should not be discarded because it is not conclusively established."

The distinction that we have drawn in working out the line dividing the causes of action, that cannot be established without clear and convincing evidence, and in some cases proof *dehors* a deed and inconsistent with it in its original shape, and the ordinary issues of fraud falling under the general rule, that it is sufficient to prove fraud to the satisfaction of the jury, is sustained by sound reason as well as high authority. One who comes into a court of conscience, declaring that he is in truth a party to a deed, that is the highest and most solemn evidence of his contract, and asks, that while the contract is allowed in part to stand, some of the provisions or stipulations shall be altered by striking out portions of the deed, and inserting in lieu contradictory

expressions, and asking a court of equity, in effect, to assist him in avoiding a statute enacted to prevent frauds, because its rigid enforcement and a strict adherence to the law of estoppels may work a remediless wrong, without such relief, occupies a different position from one who disowns *in toto*, for himself or those under whom he claims, a deed, apparently executed upon the ground that its execution was procured by fraud or undue influence, or from one who asks to set aside the deed of another, as in fraud of the rights of creditors or subsequent purchases for value. The former should be held to stricter and stronger proof to establish his right to the relief asked.

So, too, one who invokes the aid of a court to set up, by parol evidence and in the face of the denials of those interested adversely, a solemn deed, the stipulations of which are sometimes void, unless in writing, on the ground that it has been once executed, but has been lost or destroyed, is properly required to produce the clearest evidence of loss; because, if the rule were otherwise, a premium would be offered for perjury, and the rights of honest men would be imperiled by the groundless claims of those who are mercenary and dishonest.

While we have drawn the line of distinction between the two classes of actions, of which *Lea* v. *Pearce* is selected as the representative head on the one hand, and *Ely* v. *Early* on the other, it is not improper to emphasize and support, by more explicit citation of authority, the statement already made that, as applicable to allegations of mistake requiring, as the appropriate remedy, the reformation of a deed, the language used in the latter cause and adopted by the Judge below in his charge, is not stronger than is warranted by older decisions of our own Court, and sanctioned by such writers as Story and Pomeroy. We find an intimation by TAYLOR, J., in *Newsom* v. *Buffalow*, 1 Dev. Eq., 379, that the allegation in such cases must be proven "beyond rational doubt."

The authorities already cited show repeated recognitions of the rule that the proof must be clear and convincing.

Judge Story (in his work on Equity Jurisprudence, sec. 153), referring to causes in which one asks the Court to correct a deed on the ground of mistake, says: "The proof must be such as will strike all minds alike as being unquestionable and free from reasonable doubt. The distinction here attempted to be defined, in regard to the measure of proof, is much the same which exists between civil and criminal cases, or that distinction which is expressed by a fair preponderance of evidence and full proof."

Pomeroy states the rule, in reference to proof in correcting mistakes, quite as broadly: "Courts of equity do not grant the high remedy of reformation upon a probability, or even upon a mere preponderance, but only upon a certainty of error." Pom. on Eq. Jur., sec. 859.

We have not deemed it necessary to discuss the other exceptions, as that to the charge is decisive of the right to new trial

For the error complained of in his Honor's charge, a new trial will be awarded.

Error. *Venire de novo.*

JNO. M. JONES and HENRY G. SKINNER, Partners, &c., v. JOHN M. WILSON and JOSIAH MIZZELL, Partners, &c.

Appeal—Motion to Dismiss—Excuse for Failing to file Undertaking in Time.

Where, upon a motion to dismiss an appeal on the ground that the undertaking was not filed in time, it appears that the appeal was taken in good faith, and the failure to file the undertaking in time was caused by the Clerk of the Superior Court being absent from his office, the motion will be denied.

This was a MOTION, before this Court, to dismiss the appeal from the Superior Court of CHOWAN County.

Messrs. J. B. Batchelor and *Jno. Devereux, Jr.*, for the plaintiffs appellees.

Mr. W. D. Pruden, for the defendants appellants.

MERRIMON, J. The appellees moved, at the present term, to dismiss the appeal, upon the ground that the undertaking upon appeal was not filed within the time prescribed by law, nor within thirty days next after the term of the Court at which the judgment appealed from was given, the time within which it was agreed by the parties the appeal might be perfected.

We are satisfied, from affidavits produced, that the appeal was taken in good faith. It was taken at once, upon the entry of the judgment appealed from by counsel, the appellants having left the Court and gone to their homes, in a county adjoining that in which the case was tried. At once the counsel sent them an undertaking upon appeal, to be executed by them; they executed and returned the same promptly, and in apt time, to their counsel, to be filed; the latter promptly went to the Clerk's office to file it, but found the Clerk was absent, and he continued absent for several days, at a distant point, and they could not then file it; they went for the like purpose a second time, and the Clerk was not at

his office; he was sent for, came, and the undertaking was filed within a few days after the lapse of the time within which it was agreed by the parties the appeal might be perfected.

It appears that the appellants themselves were diligent in respect to the undertaking, and their counsel made reasonable effort to file it in apt time. They failed to do so because of the absence of the Clerk from his office, and the fault was largely, if not altogether, his. The appellees suffered no substantial harm, by the delay of a few days to file the undertaking, and there seems to have been reasonable excuse, certainly on the part of the appellants, for such failure. We think the case came fairly within the statute cited and interpreted in *Harrison* v. *Hoff*, decided at the present term. That case is substantially like the present one, and must govern it. The motion to dismiss the appeal must be denied.

Motion denied.

JAMES B. ALLEN v. THOS. O. SALINGER.

Ejectment by Tenant in Common against his Co-tenant; When Demand Necessary; Effect of Plea of Sole Seizin—Verdict and Judgment—Issues and Verdict in Ejectment—Possession—Estoppel by Record.

1. If one tenant in common sue his co-tenant for possession, the action will be dismissed if it is shown that plaintiff's rights were not denied, and he had given no reasonable notice to his co-tenant of his demand to be admitted to joint possession; but where the defendant in such an action, by his answer, denies the plantiff's title, he thereby admits an ouster, and the action lies.
2. Where, in such an action, the defendant pleads sole seizin, he cannot, after a verdict in favor of plaintiff, avail himself of a defence which would be in harmony with the verdict.

3. Possession by the bargainee, open, continued and adverse, of part of a tract of land covered by deed, is possession of all of the tract not occupied by some one else, and such possession, continued for seven years, will ripen into title.

4. Plaintiff claimed title to the whole of a tract of land of which he alleged that defendant was in possession; defendant denied being in possession of any land belonging to plaintiff. One of the issues submitted to the jury was: "Is plaintiff the owner of the land described in complaint?" To which the jury responded: "Yes; one-seventh of the Sandy Bottom tract—160 acres." The jury also found in response to another issue, that defendant was in possession of the land: *Held*, (1) that an objection by the defendant, that the finding of the jury on the first issue was not responsive, was not tenable; (2) that a judgment that plaintiff recover the whole land was erroneous; the judgment should have been that plaintiff recover, and be let into possession with defendant as tenant in common, to the extent of a one-seventh interest.

5. Where the title to land is put in issue by the pleadings and issues, the verdict and judgment operate as an estoppel on the parties as to the title.

6. The Court has countenanced and approved the practice of defining, in the verdict, the extent of the plaintiff's interest in the land in controversy, either by metes and bounds, or as an undivided fractional interest.

This was a CIVIL ACTION, tried at the February Term, 1889, of the Superior Court of MARTIN County, before *Graves, J.*

The plaintiff demanded possession of a certain tract of land, and the defendant denied that he was in possession of any land belonging to the plaintiff, or that there was any such land in Martin County as that claimed by the plaintiff.

The issues and findings of the jury were as follows:

1. "Is plaintiff the owner of the land described in the complaint?" Answer. "Yes; one-seventh of the Sandy Bottom tract—160 acres."

2. "Is defendant in the wrongful possession thereof?" Answer. "Yes."

3. "What is the plaintiff's damage?" Answer. "Ten cents."

Judgment was rendered upon the verdict in favor of plaintiff.

On the trial, it was agreed that one Ezekiel Leary had originally owned the land. The plaintiff offered evidence tending to show, that Emmanuel Leary was a son and heir of Ezekiel Leary, and then offered a deed from Emmanuel Leary to Bradford Allen, dated in 1842. The plaintiff then offered evidence that he was son and heir of Bradford Allen, who had six other children, his heirs. There was evidence, tending to show the location of the land described in the deed to Bradford Allen, and tending to show that it was known as the Sandy Bottom tract, of 160 acres. There was also evidence tending to show possession by Bradford Allen, and those claiming under him, for forty years, of the land in controversy. There were many deeds offered by defendant from heirs of Ezekiel Leary and others, which the defendant insisted covered the land in controversy, and offered evidence tending to show it. There was no evidence that any judicial proceedings had ever been had for partition of the lands of Ezekiel Leary. There were no exceptions to the evidence. There were no special instructions asked for by the defendant, and there were no exceptions taken at the time to instructions given. After the verdict the plaintiff moved for judgment, and defendant moved for new trial for alleged errors in the instructions given. The instructions given presented every aspect of the case arising on the volume of evidence, oral and documentary. The only error alleged was, that the Court had instructed the jury that if the plaintiff and those under whom he claimed held possession of a part of the land embraced in his deed for more than seven years, openly, continuously and adversely, it would ripen his title to all the land embraced in his deed which was not occupied by any one else, unless there was a lappage; if there was a lappage, and neither party was in possession of the lappage, as to that part embraced in both deeds, the latter title would prevail. The motion for new trial was overruled. Then the defendant objected that the answer of the jury was

not responsive to the issues, and was vague and indefinite. The Court being of opinion that the answer of the jury was sufficient, gave judgment for the plaintiff, and the defendant appealed.

Mr. H. W. Stubbs, for the plaintiff.
Mr. A. O. Gaylord (by brief), for the defendant.

AVERY, J. (after stating the facts). If the defendant had not denied in his answer that the plaintiff was the owner of the land in controversy, and thereby acknowledged that he had ousted plaintiff, his co-tenant, but had asked that the action be dismissed on the ground that he and the plaintiff were tenants in common, and the plaintiff ought to have given reasonable notice to be let into possession before issuing the summons, this action could not have been maintained.

As it sufficiently appears from the record that Ezekiel Leary was the common source of title, and that there was evidence tending to show that plaintiff and defendant each traced his title through different heirs-at-law of Ezekiel to him, and were, therefore, tenants in common, the charge of the Court would have been erroneous if the answer had averred the co-tenancy and set up the want of notice. *Page* v. *Branch*, 97 N. C., 97, and cases there cited. But the defendant has denied the plaintiff's title to the land, and gone so far as to deny that there was land filling the description in the complaint. It being admitted that the title was out of the State and in Ezekiel Leary, the principle enunciated by his Honor, as to the acquisition of title by possession, was correct, and applicable to the evidence. The defendant, by his pleadings, has averred that he holds adversely, and cannot now avail himself of a new defence which would be in harmony with the verdict. *Withrow* v. *Biggerstaff*, 82 N. C., 82.

The objection that the finding of the jury was not, in its terms, responsive to the first issue, is not, we think, tenable. Where the title, not the possession, is in issue in an action for possession, the verdict and judgment operate as an estoppel on the parties as to title. This Court has countenanced and approved the practice of defining, in the verdict, the extent of the plaintiff's interest in the land in controversy, either by metes and bounds, or as an undivided fractional interest. The manifest justice and propriety of this practice grows out of the effect of the judgment in such actions. The jury found that the plaintiff was the owner of one undivided seventh, and, in view of the testimony, the finding can be fairly interpreted to mean *one undivided seventh* interest in the land in controversy. *Withrow* v. *Biggerstaff, supra.*

But the judgment of the Court, that the plaintiff recover the whole of the land, was erroneous, and was doubtless signed by his Honor without adverting to its form. The judgment should have been rendered for the recovery of the land, with an order that the plaintiff be let into possession with defendant, as tenant in common, to the extent of his interest, and must be modified so as to conform to this view.

A plaintiff, showing title only to an undivided interest, may have judgment, without qualification, for the whole, against one who has no title. But it appears from the record that the defendant did show evidence of title, derived from Ezekiel Leary, the admitted source of title, and the form of the verdict was probably due to that testimony. But the plaintiff, who has proven title to one undivided seventh, must, if he would have judgment for the whole, have shown on trial that the same evidence of title or possession that established his own title, demonstrated the fact that others than defendant held, as co-tenants, the other interest, and this action would inure to their benefit. But the burden is always on plaintiff in such actions, and he must establish

his right clearly to the judgment demanded, just as he is required to show title, good against the world. *Overcash* v. *Kitchie*, 89 N. C., 384; *Yancy* v. *Greenlee*, 90 N. C., 317.

A new trial will not be granted, and, with the modification mentioned, the judgment will be affirmed.

Modified and affirmed.

WALLACE BROTHERS v. R. M. DOUGLASS.

Deputy U. S. Marshals, Compensation of—Rev. Stat. U. S., § 3477—Evidence; Objections to before Referee; Disposing of such Objections by Judge.

1. Deputy United States Marshals have no claim against the Government for their compensation, but must look to the Marshal therefor. Hence, an assignment by a Deputy Marshal of his claim for compensation against the Marshal is not a violation of § 3477, Rev. Stat. U. S.

2. A referee admitted certain evidence, which was objected to, and made his report without ruling on the admissibility of such evidence. In the Superior Court there was an order of re-reference, in which the referee was expressly directed to rule upon the admissibility of the evidence objected to. The referee made another report, without passing on the evidence, and the defendant excepted: *Held*, that it was error to give judgment confirming the report without passing on the objection to the evidence, and that the Judge below could pass upon the competency of the evidence, without again recommitting the case to the referee.

(SHEPHERD, J., dissented as to the disposition made of the case.)

CIVIL ACTION, tried before *Philips*, *J.*, at Fall Term, 1888, of IREDELL Superior Court.

The plaintiffs allege, in substance, in their complaint, that on the 4th of December, 1879, and for several years next

before that time, the defendant was Marshal of the United States in the Western District of North Carolina; that W. J. Patterson, J. T. Patterson, Jr., and S. P. Graham, during a part of that time, had been, and at the time specified were, his Deputy Marshals, and, as such deputies, had respectively earned fees for large amounts, and by their respective agreements with the defendant, as such Marshal, they became and were respectively to have two-thirds of the fees by him so earned; that large sums of money were so due to each of said deputies; and the said W. J. Patterson drew his order upon the defendant, and the following is a copy thereof:

"$325. November 16, 1881.

"Pay to the order of W. J. Patterson, three hundred and twenty-five dollars; value received, and charge the same to the account of W. J. PATTERSON.

"To R. M. DOUGLASS, *U. S. Marshal.*"

"Accepted; payable when I receive funds to the use of W. J. Patterson.

"R. M. DOUGLASS, *U. S. Marshal.*"

And the said J. T. Patterson, Jr., likewise drew his order upon the defendant, and the following is a copy thereof:

"$200. December 4, 1879.

"Pay to the order of myself, two hundred dollars; value received, and charge the same to the account of

"J. T. PATTERSON, JR., *D. M.*

"To R. M. DOUGLASS, *U. S. Marshal.*"

Which has the following written across the face thereof:

"Accepted; payable when I receive funds to the use of J. T. Patterson, Jr.

"R. M. DOUGLASS, *U. S. Marshal.*"

That said drafts were accepted by the defendant as stated, and recited at the end of each.

And the said S. P. Graham assigned to the plaintiffs, of the fees so due to him, the sum of $98.82, and such assignment was recognized and "accepted" by the defendant, to be paid when he should receive funds to the use of the said Graham as deputy; that the plaintiffs became the owners of the said drafts by proper endorsements; that the claims of the said deputies against the defendant, for fees, have been audited in the Treasury Department of the United States, and "funds to the use of" said deputies respectively mentioned, sufficient to pay the said amounts, had been received by the defendant as Marshal; that he, nevertheless, refused upon demand to pay the money so due the plaintiffs; and they demand judgment for the same, and for costs.

The defendant failed to file an answer to the complaint, and, upon motion of the plaintiffs, judgment by default and inquiry was entered against him. Thereupon, by consent of parties, it was, by proper order, referred to a referee, "to hear the testimony, take and state an account, and report to this Court," &c.

Afterwards, the referee made report favorable to the plaintiffs.

In the course of taking the account, the plaintiffs put in evidence copies of certain accounts stated and audited between the defendant as Marshal and the United States, purporting to be certified by the Register of the Treasury, for the purpose of proving that the defendant had been allowed and had received the fees earned by his deputies named as alleged. The defendant objected to the admission of these copies, stating numerous grounds of objection to them, and their competency and sufficiency as evidence. The referee, without deciding that they were or were not competent, received them in evidence, and considered them in connection with other evidence in deducing his conclusions of facts and making his report filed.

At a subsequent term of the Court, the report so made was set aside, and it was re-referred to the same referee, with instructions to retake and restate the account required, and particularly for the present purpose, the Court directed as follows:

"6. For the purpose of enabling the commissioner to find these facts, the case is re-opened for further evidence on both sides. And that the commissioner will make his report under this order to the next term of this Court, in which report he will pass upon and report whether he allows or overrules the exceptions to the evidence made by either plaintiffs or defendant. And the judgment signed in this case, at this term of the Court, is hereby set aside and vacated.

"All exceptions of defendant, not as to the merits of the controversy, are overruled."

The referee proceeded to execute the order of re-reference, and made report, from which it appears, that at a time and place specified, he "proceeded to re-open the cause, when and where further testimony was introduced by the parties; and after due consideration of the testimony heretofore introduced, together with the evidence produced at this time," he drew conclusions of fact and conclusions of law arising thereupon. But he did not "pass upon and report whether he allows or overrules the exceptions to the evidence" (the copies of accounts stated and audited between the defendant and the United States, objected to as above stated); he retook and restated the account, and made report thereof, to which the defendant filed numerous exceptions. Only the first and fifteenth of them need be repeated here, and the following is a copy of them:

"1. Defendant excepts to said report, for the reason that said referee fails to pass upon the competency and relevancy of certain alleged transcripts from the Treasury Department, Register's office, Washington, D. C., offered in evidence by

plaintiffs, and objected to by defendant (Nos. 4, 5 and 6, on pages 2, 3 and 4 of testimony taken in October, 1887), as he was required to do by the order of Connor, J., recommitting this case to said referee.

"15. That it is contrary to the laws and regulations of the United States Government to sell and assign such claims as those sued on by the plaintiffs, and they are not entitled to recover on that account."

The Court overruled all the exceptions, confirmed the report, and gave judgment for the plaintiffs; and the defendant, having excepted, appealed to this Court.

Messrs. Chas. Armfield and *W. D. Turner*, for the plaintiff.
Messrs. D. M. Furches and *W. M. Robbins*, for the defendants.

MERRIMON, J. (after stating the case). No statutory provision of the United States brought to our attention, or of which we have knowledge, gives or secures to Deputy Marshals any claim against the Government for, or any interest in, fees or compensation earned by them as such deputies. Neither fees nor compensation are prescribed by statute for them, nor are they recognized or treated as entitled to the same, as of legal right, or as creditors of the Government. The fees they earn are, certainly, ordinarily for, and belong to, the Marshal. In the nature of their employment and duties, they act in his name and place, and the fees they earn are due to him and are charged in his name. They are little more than his agents or servants, invested with some measure of his authority conferred by law, and they are recognized by the law only to determine their rights and liabilities, and the rights and liabilities and duties of third parties arising out of what they do or fail to do as deputies. Their claims for compensation are against the Marshal, accordingly as he and they agree upon the measure of it, and how and when it shall become due and payable. No

doubt, he may allow to them and they may agree to accept the fees they earn in his name and for him, or a part of them, as compensation, to be paid to them when such fees shall be allowed to him by the proper auditing authorities of the Government, and he shall be paid the same under existing laws, or he may pay them fixed salaries. The matter of their compensation is between them and the Marshal, not between them and the Government.

The statute (Rev. Stat. U. S., secs. 780, 784, 829, 830, 833, 834, 841, 844, 846) prescribes the fees and compensation the Marshal may have—the maximum he may take—how he shall account with the Government—that he shall give bond and be liable for breaches of the condition thereof; but no fees or compensation are prescribed for his deputies, nor is their liability prescribed—the Marshal is liable for their misfeasance and non-feasance within the sphere of his office. Section eight hundred and thirty-three requires the Marshal, in making his semi-annual report to the Attorney General of the fees and emoluments of his office, to "state separately therein the fees and emoluments received or payable for services rendered by himself personally, those received or payable for services rendered by each of his deputies, naming him, and the proportion of such fees and emoluments which, by the terms of his service, each deputy is to receive." And there is a provision in section eight hundred and forty-one cited, restricting allowances on account of deputies. The purpose of these requirements and provisions is not to give deputies any claim against the Government, but to facilitate the adjustment and settlement of the accounts of the Marshal, and to prevent him from receiving more than the maximum of compensation allowed him by law. There are numerous other statutory provisions, all pointing, more or less directly, to the right of the Marshal to have claims against the Government for fees and emoluments earned by

him for services rendered by himself and his deputies in a variety of ways, but none that give deputies such right.

The deputies of the defendant named in the pleadings, as to their claims in question, did not, therefore, have any claims against the United States for fees and emoluments, or otherwise, as implied by the fifteenth exception of the defendant, but their claims were against him, for such part of the fees earned by them, respectively, as he agreed with each he should have, to be paid by him when the Government should allow and pay his claims against it. The deputies each assigned his claim, or part of it, whether by draft or otherwise, against the defendant, and not his claim against the Government, and hence the statute (Rev. Stats. U. S., § 3477), making absolutely void "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional," &c., unless made in the way prescribed, has no pertinency or application here, and does not affect the rights of the plaintiffs. And for the like reason, *Frist* v. *Child*, 21 Wall. 441; *United States* v. *Gillis*, 95 U. S., 407; *Spofford* v. *Kirk*, 97 U. S., 484, cited and relied upon by the defendant, are not applicable. The Court, therefore, properly overruled the fifteenth exception of the defendant.

We are of opinion that the defendant's first exception should have been sustained. The referee was expressly directed by the Court to "pass upon and report whether he allows or overrules the exceptions to the evidence (that heard by him) made by either plaintiffs or defendant," the purpose being, to afford opportunity to the Court to decide upon the competency of evidence objected to, upon proper exception to the ruling of the referee. The latter failed to pass upon the evidence objected to in question; nor did the Court. That it did not is assigned as error.

It might be said that the referee, and after him the Court, did, by implication, decide that the evidence was competent

and unobjectionable, and possibly this is so; but the defendant was deprived of opportunity to assign error in that respect, and if there was error, we cannot correct it in the absence of exception or error assigned. The gist of the exception is, that the defendant did not have opportunity to assign error in the respect mentioned. This seems to us to have force and merit.

The counsel of the plaintiffs insisted, on the argument, that the objection embraced by the exception "does not go to the merits of the controversy," and, therefore, in view of the order of the Court, the exception should not be sustained. We cannot accept this argument as a valid one. The evidence objected to, if competent, was very important indeed; it went directly and strongly to prove that the accounts of the defendant, as to fees earned by his deputies named in the pleadings, had been allowed as to each by the Government, and he had received the money on account thereof, as to each, to an amount greater than each had assigned to the plaintiffs, which they seek to recover in this action. The defendant seriously contends that the certified copies of accounts audited and settled, objected to, are not evidence against him in this action, and the objection may be well founded. We do not decide now that it is or is not. The Court below should have decided upon the objections to the evidence, so that the complaining party might have had opportunity to assign error and appeal to this Court.

The first exception must be sustained, and the Court, without a re-reference, will decide upon the questions of law raised by the defendant's objections to the evidence referred to in it, and give judgment upon the report of the referee, if this may properly be done, or, for sufficient cause, it may set aside the report and direct the account to be retaken, and proceed in the action according to law.

All the other exceptions of the defendant were properly overruled, except in so far as the matters of them may be

affected by the decisions of the Court in respect to the evidence referred to in the first exception.

Error. New trial.

SHEPHERD, J., (dissenting). I do not concur in the disposition made of this case. The evidence objected to is fully set forth in the case upon appeal, and its competency was thoroughly argued by counsel. If it is incompetent, it will be necessary for us to know whether the referee considered it in finding the facts, and the cause should be remanded. If it is competent, it is immaterial whether he acted upon it or not, and it would, it seems to me, be doing a vain thing to remand the cause in order to get his opinion upon the subject. I think we should now pass upon the competency of the testimony.

C. MILLHISER v. C. ERDMANN et al.

Sale—Contract—Assignment.

Where the terms of a sale of goods were, that the buyer should give notes for the price, but after the goods were delivered to him the buyer refused to give the notes: *Held*, that no sale was consummated by the delivery—there was only an agreement to sell, which was not perfected, and the seller could recover the goods from the buyer or from one to whom he had assigned them by a general assignment for the benefit of creditors.

This was an ACTION OF CLAIM AND DELIVERY, tried before *Graves, J.*, and a jury, at the February Term, 1888, of CRAVEN Superior Court.

The plaintiff testified that during the year 1885, and since, he was doing business in Richmond, Va., as dealer in leaf

tobacco for the manufacture of cigars, and that during said time the defendant Erdmann was doing business in Newbern, N. C. That on or about the 28th of November, 1885, the plaintiff received from said defendant a postal card as follows:

"NEWBERN, November 27, 1885.

"DEAR SIR: Are you still in the leaf business? If so, send me sample of some binders, good stock, and samples of Havana and Havana wrappers if you have some real nice stock on hand. You may also send me samples of Hustorick wrapper if you have nice goods.

"Yours, &c.,

"C. ERDMANN."

To which plaintiff replied as follows:

"December 1, 1885.

"DEAR SIR: In reply to yours of the 27th, I have sent you the following samples, per express:

"Veg. 20 Havana, @ $1.10; do. genuine V. A., @ $1.25; 6 do. wrappers, @ $1.25; 876 No. 488–89 wrappers, @ $1.25; 242 No 466–86 wrappers, @ 35c.; 151 No. 483–83 wrappers, @ 35c.; 11 No. 486–86 binders, @ 12c.; 16 No. 487–87 do. @ 12c

"Terms, 3, 4 and 5 months notes. I have put these goods down very low, and hope to receive your order, as I feel sure the goods will give you entire satisfaction. Awaiting your prompt reply, I remain,

"Yours, &c.,

"CHAS. MILLHISER."

Not hearing from Erdmann in the meantime, the plaintiff, on December 13, 1885, sent to him a letter, as follows:

"Please let me hear from you in regard to samples 'leaf' sent you December 1, from which I hope you have been

able to make a selection. Trusting to hear from you, and soliciting your kind favors, which shall have prompt and best attention,

"Yours, &c., CHAS. MILLHISER."

That Erdmann received the samples in due course, and also the letters above set out; and on December 27, 1885, the plaintiff received a letter from Erdmann, as follows:

"NEWBERN, December 25, 1885.

"DEAR SIR: You can send me the following goods: Case 242 and 151, the two best bales Havana No. 16 and 6; and the binders I don't like; I must have better ones; if you have better, you may send me one case, and I would like to have a nice case of cheap cigars at about $10 per thousand, put up 50 in a box.

"Hoping business is good with you,

"I am, &c.,

"C. ERDMANN.

"P. S. You send the tobacco; be sure and give me weight for government book."

That on December 28, 1885, the plaintiff mailed to Erdmann the following letter, which contained the invoice and the three promissory notes therein mentioned, all of which were received:

"DEAR SIR: Your favor 25th received, and I hand you enclosed invoice of two cases wrappers and two bales Havana, shipped by steamer as per your order. Am sorry the binders do not suit you. As I do not handle any Penn. cigars I turn your order over to Messrs. H. Brownheld & Bro., who said they would send you samples.

"Enclosed I hand you three notes at three, four and five months, which please make payable at your bank and return signed, in settlement, at earliest convenience, and oblige,

"Yours truly,

"CHAS. MILLHISER."

On the same day the plaintiff shipped by steamboat the tobacco as set forth in the letter, and it was admitted that the same was duly received by Erdmann, and that the value thereof was as stated in the complaint, to-wit, four hundred dollars.

The defendant Erdmann did not execute and send to plaintiff his notes; and on January 16, 1886, plaintiff received from said defendant a postal card as follows:

"DEAR SIR: I just received the goods; send drafts to acceptance, as long time on them as possible. I will accept and return; that is the way I do with the rest of the dealers.

"Yours truly,

"C. ERDMANN."

On the same day the plaintiff replied:

"DEAR SIR: Your favor of the 15th is received, and in reply will say, that when I sent you samples I wrote you on December 1, giving you price and terms, notes at three, four and five months. It is with this understanding you ordered the goods, and on these terms I shipped the goods. More than half your bill is Havana, on which the duty is 35 cents per pound, and must be paid in cash before goods can be removed, and the balance of time is never over ninety days on Havana, but I have put all this in your bill as agreed upon, at three, four and five months, which is an average of four months time to all; but you can either send me the notes at three, four and five months, or if you prefer, you may make five notes at two, three, four, five and six months

from date of shipment, December 28. This is the best I can do; I cannot regulate my business by what some other houses do. The regular terms of some of the best and largest New York firms are four months note on seed leaf, and duty cash and ninety days note for balance on Havana tobacco, but I gave you more liberal terms; I gave you prices and terms, as per my letter of December 1, at three, four and five months notes, and it was on these terms you bought the goods, and you should make settlement accordingly; but I enclose you five notes at two, three, four, five and six months, and you can take your choice, either send the first three notes or these five notes, which I trust will be satisfactory; but if you are not satisfied, you will please return me the entire lot of goods and send me shipping receipts, and oblige,

" Yours, &c.,

"CHAS. MILLHISER."

That Erdmann did not reply to this letter, and did not send his notes as therein requested, nor any notes. Plaintiff failing to get the notes or a return of the tobacco, came to Newbern, and on February 7, 1886, made a demand on W. W. Clark, and all the defendants, for the tobacco aforesaid, the delivery of which was refused.

It was admitted that the tobacco was in the actual possession of the defendant John Schissler at the time of demand.

Plaintiff further testified, that he had contracted to sell the tobacco for the negotiable promissory notes of the defendant Erdmann, as set forth in the above correspondence, and only on the terms therein stated, and that said defendant had not complied with said contract; that said notes, such as taken in the course of trade, are of value to the plaintiff as commercial paper.

The defendants introduced the following evidence:

An assignment of defendant Erdmann of a stock of goods, which included the said lot of tobacco, to W. W. Clark, for the benefit of creditors, recorded on the 28th of January, 1886; that said assignee at once took charge of said stock and placed it in the hands of defendant Schissler as his agent. It was admitted that no part of the contract for the purchase of said tobacco was ever registered.

The defendant introduced a bill for the goods in controversy, which was sent to the defendant C. Erdmann at the time of the shipment of the goods by the plaintiff, of which the following is a copy:

All sales not settled in ten days from date of purchase subject to draft with current exchange on New York or Richmond.

All settlements of accounts to be made direct with the firm.

All claims must be made within five days after receipt of goods.

RICHMOND, VA., Dec. 28, 1885.

MR. C. ERDMANN, *New bern, N. C.*,

Bought of CHAS. MILLHISER,

Manufacturer of Fine Cigars, Packer of Seed Leaf, and Importer of Havana Tobacco.

Interest will be charged on all accounts not paid at maturity.

Terms: 3, 4 and 5 Mos. Notes. No. 15 South 13th Street.

1 Case Wrappers, No. 151,	483—83=400 lbs.,	@	33	$132.00
1 Case Wrappers, No. 242,	466—86=380 lbs.,	@	35	133.00
1 Bale Hav., Vega. 16, No. 1,077, No. 120—13=107 lbs.		@	$1.15	123.05
1 Bale Hav., Vega. 6. No. 1,055, No. 134—13=121 lbs.		@	1.25	151.25
Drayage,				50
				$539.80

O. D. Line, via Norfolk.

The defendant insisted that an issue should be submitted to the jury, as to the waiver of the condition upon which the goods were agreed to be sold arising from the delivery of the goods to the defendant Erdmann by the plaintiff, before the performance of the condition and the circumstances attend-

ing the delivery. The Court held that there was no question of fact for the jury, and gave judgment for the plaintiff. The defendants excepted and appealed.

Messrs. C. Manly and *W. E. Clarke,* for the plaintiff.
Mr. W. W. Clark, for the defendants.

AVERY, J. (after stating the case). This cause was before this Court at the September Term, 1887 (98 N. C., 293). A new trial was then awarded the plaintiff, and the Court said: "No sale of the tobacco was consummated or made effectual under the contract. There was only an agreement to sell, which was not perfected. The plaintiff did not agree or intend to part with his tobacco, until he received the notes, and Erdmann had no right to expect to get title to it until he sent the notes."

The case comes up now on the defendants' appeal; but the facts are precisely the same as those stated in the former case, except that a copy of the account rendered, including bill-heads, by the plaintiff, and dated December 28, 1885, is put in evidence. It is plain, as decided by this Court, that the letters of the parties, written December 1, December 25, and December 28, 1885, and two of January 16, 1886, establish a contract between the parties, slightly modified by the indulgence of the plaintiff, extended at the defendant's request, but still an agreement assented to by both, that the contract should be complete so as to pass title to the tobacco on the return to the plaintiff of the notes signed by the defendant. We cannot agree that the plaintiff shall be bound, and this express contract abrogated or varied by implication, arising out of a note at the top of his bill-heads, especially when the defendant agreed to sign the drafts, but did not in any way signify his assent to the terms printed at the head of the bill, and was in no way bound by a proposal to buy on such terms.

If there had been no correspondence in reference to terms, and the goods had been ordered, shipped and received, with no allusion to the time and manner of payment, except that contained in the account rendered, we would have deemed it our duty to give grave consideration to the argument of the learned counsel for the defendant, and the authorities cited by him.

No error. Affirmed.

THOS. N. HILL, Adm'r, v. HILLIARD & CO. and J. L. OUSBY.

Statute of Limitations, Agreement not to Plead; Claimants under Mortgagor can plead it against Mortgagee.

1. The indulgence of a debtor by the creditor, at the special request of the debtor, will not prevent the running of the statute of limitations. To prevent the statute's being a bar, there must be an *agreement*, express or implied, on the part of the debtor, that he will not plead the statute.
2. A subsequent mortgagee, or purchaser of the equity of redemption, has the right to avail himself of the statute of limitations as a defence to the first mortgage, and after the rights of the first mortgagee are barred by the staute, no act or acknowledgment on the part of the mortgagor can revive the mortgage as to subsequent mortgagees or purchasers.
3. A subsequent mortgagee, or purchaser of the equity of redemption, can avail himself of the protection of the statute of limitations against a prior mortgagee, although the mortgagor is a party to the action and refuses to plead the staute.

CIVIL ACTION, tried before *MacRae, J.*, at Fall Term, 1888, of HALIFAX Superior Court.

The following are agreed upon as the facts in this controversy:

1. That on the 3d day of March, 1876, the defendant James L. Ousby executed to Maria J. Lowe a mortgage in fee on two lots near the town of Halifax, numbered 8 and 9, to secure three notes, all then past due, upon condition that if said Ousby should pay said notes by January 1, 1877, said mortgage deed should be void, and with power of sale in case of default. Said deed was duly registered in Halifax County.

2. That on the 5th day of April, 1886, said Ousby mortgaged the said lots, along with other real and personal property, in fee, to the defendant Louis Hilliard, to secure a debt of $1,124.35, due ten months thereafter, with 8 per cent. interest after maturity, which deed was duly registered in Book 74 B, page 364, of the Register's office of said county, April 5, 1886. There is still due on this mortgage debt $962.52, with 8 per cent. interest from 1st day of March, 1888. All the personal property embraced therein has been subjected thereto, and the real estate, outside of lots 8 and 9, is insufficient to pay said debt.

3. That nothing has ever been paid on the Maria J. Lowe notes or mortgage debt.

4. That said Maria J. Lowe died domiciled in Halifax County in the year 1881, leaving a last will and testament, and on the 28th day of March, 1882, R E. Moseley qualified as her administrator with the will annexed. On the 3d day of July, 1882, said Moseley having died, the plaintiff, Thos. N. Hill, duly qualified as administrator *de bonis non*, with the will annexed, on said estate.

5. That Louis Hilliard & Co. had actual notice of the M. J Lowe mortgage at the time of accepting the mortgage to them.

6. That said Thos. N. Hill never had any actual notice of the mortgage to Louis Hilliard & Co. (save such notice as registration confers) till the latter part of January or first of February, 1888.

7. That said Hill did not sue upon or foreclose the M. J. Lowe mortgage, described in the complaint, prior to January 1, 1887, because he was requested to indulge the same by said Ousby, and he did indulge him at his special request; and on the 29th day of December, 1887, said Ousby executed and delivered to said Hill the paper herewith filed, marked "Exhibit A." The said Hill having great confidence in the integrity of said Ousby, and the said Ousby being in straightened circumstances, said Hill indulged him without apprehension that he would set up the statutory bar as a defence, or endeavor by any means to prevent his collecting said notes; and said Ousby has made no effort to prevent such collection.

8. That said Ousby is now, and has been since the execution of the mortgages to the said Lowe and Hilliard & Company, in possession of the said lots 8 and 9.

* * * * * * *

Under these facts the question whether the M. J. Lowe mortgage is barred by the statute of limitations, as against Louis Hilliard & Co., and who plead the same, is submitted for the decision of the Court.

The following is the judgment rendered below:

"This cause coming on to be heard upon the case agreed, and the Court being of the opinion that the statute of limitations is a plea not favored, and that it is a personal privilege of the defendant Ousby, and cannot be set up by the second mortgagee, Hilliard—

"It is adjudged that the plaintiff Thomas N. Hill, as administrator, &c., of Maria J. Lowe, deceased, recover of the defendant James L. Ousby the sum of five hundred and fifty-five dollars and sixty-eight cents, with interest on $264.98 from the first day of January, 1889, till paid.

"It is further adjudged, that said recovery is the first lien on the lots Nos. 8 and 9, on the plot of Martha B. Eppes' estate, situate near the town of Halifax.

"It is further adjudged, that the defendants, Louis Hilliard & Company, recover of the defendant James L. Ousby the sum of $962 52, with interest on said sum of nine hundred and sixty-two dollars and fifty-two cents, at 8 per cent., from the first day of March, 1888, till paid.

"It is further adjudged that the said recovery of said Hilliard & Co. is a second lien on said lots Nos. 8 and 9, and the first lien on the other lots described in the answer.

"It is further adjudged, that unless the aforesaid recovery of the plaintiff, and of the defendants Hilliard & Co., is paid off within sixty days from the first day of this term, then that all said lands shall be sold by R. O. Burton, Jr., and A. J. Burton, hereby appointed commissioners for that purpose, after due advertisement according to law, who will make due report to this Court.

"The following is a fuller description of the other lots above referred to: All those lots near the town of Halifax, numbered on the plot of Martha B. Eppes' estate as lots Nos. 4, 6 and 11 (except a small part of 6 and 11, as shown by the plot in the partition agreement between Jas. L. Ousby and M. Whitehead).

"The cause is held for further directions."

The defendants Hilliard & Co. appealed.

Mr. A. J. Burton, for the plaintiff.

Mr. R. O. Burton, for the defendant Hilliard.

SHEPHERD, J. This action was commenced on the 23d of February, 1888, eleven years after the forfeiture of the plaintiff's mortgage, and the mortgagor has been in possession of lots numbers eight and nine during the whole period, and has made no payment. About nine years after the forfeiture, Ousby, the mortgagor, executed a mortgage upon his equity of redemption to the defendant Hilliard, and it is admitted that the property, "outside of lots numbers eight and nine, is

insufficient to pay" his debt. Had anything transpired between the plaintiff and the mortgagor, before the execution of the mortgage to Hilliard, by which the running of the statute of limitations was suspended? We think not. There was no agreement, either express or implied, that the mortgagor was not to plead the statute.

The case only shows that the plaintiff indulged him at his "special request, having confidence in his integrity, and without apprehension that he (Ousby) would set up the statutory bar as a defence." Very clearly this does not bring the case within the principle of *Barcroft* v. *Roberts*, 91 N. C., 363, and the authorities there cited. In that case there was a promise not to plead the statute, and the Chief Justice, commenting upon the decision, said, in *Joyner* v. *Massey*, 97 N. C., 148, that "it carries the doctrine to its extreme limits, beyond which I am unwilling to go." There being nothing to arrest the running of the statute, the statutory bar was more than complete when the mortgagor executed to the plaintiff a writing by which he promised to pay the debt, and agreed that he would not plead the statute, either to the "notes or said mortgage." He now declines to plead the statute, and the question is whether his conduct, after the mortgage was barred, can have the effect of repelling the statute in so far as it affects the defendant Hilliard. It is true that the plea of the statute is a personal one, but we think with Mr. Wood, in his work on Limitations, sec. 230, "that where the rights of subsequent mortgagees intervene, or where the mortgagor has sold the premises, an acknowledgment or payment afterwards made by the mortgagor, after the statute bar has become complete, revives [does not revive] the mortgage so as to defeat any of the rights of such subsequent mortgagee or grantee. But, so far as his own interests are concerned, he may revive the mortgage by such acts, but not so as to impair or defeat the rights of other parties, who, previous to such acts, acquired an interest in the premises. * * * It seems that when the statute has run

upon a prior mortgage, the holder of a subsequent mortgage, cancelled as against a mortgage out of possession, and a court of equity, upon proper proceedings to that end, will direct its cancellation on the ground of such bar." The context fully justifies the negative words inserted in brackets, and the case of the *N. Y. Life Ins. Co.* v. *Covert*, 39 Barb., 440, cited by Wood, plainly shows the mistake of the author or printer. The opinion in the case says: "That such being the relation between Cornell and the defendants deriving title under him, it would be inequitable and unjust to allow either, by any act or declaration, to affect the rights or interests of the others in regard to the incumbrance, either by a written acknowledgment of the debt or by part payment." Jones on Mortgages, sec. 1509, says: "Moreover, it is held that purchasers from the mortgagor, subsequent to the execution of the mortgage, may plead the statute of limitations as a defence to an action commenced after the statute has run against the debt secured." *Lent* v. *Shear*, 26 Cal., 16; *Medley* v. *Elliott*, 62 Ill., 532; *Schmucker* v. *Sibert*, 18 Kan., 110; *Fox* v. *Blossom*, 17 Blatchf., 352. We have no decisions upon the subject in this State, but we think the principles laid down in the authorities cited are consistent with reason and equity, and we, therefore, adopt them.

The judgment below should be modified according to the views expressed in this opinion.

Modified and affirmed.

J. J. BOONE et al. v. JAMES B. LEWIS.

Wills, Witness to—The Code, § 2147.

1. A witness to a will assumes a serious duty and legal relation thereto, *necessary* to its validity if there be but two witnesses, and an *important* one, however many there may be. The witness cannot rid himself of this duty for any cause, at his will and pleasure, certainly not without the testator's consent, given in his life-time. Having subscribed as a witness, he is held by the law to such relation and the legal consequences of it.
2. To be held as a witness to a will it is essential that the subscriber consent to be such, and that he sign in the presence of the testator.
3. Where one signs his name on a will in the place where the subscribing witnesses usually sign, there is a presumption that he signed as a subscribing witness, but the contrary may be shown.
4. Where there was written, at the bottom of a will, "Witness, A B, C $\overset{\text{his}}{+}$ $\underset{\text{mark.}}{}$ D, E F," and E F was a devisee in the will: *Held*, that it was competent to show that E F signed as a witness to the mark of C D, and did not sign in the presence of the testator, or, at his request, become a subscribing witness to the will itself.
5. One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. *The Code*, § 2147.

CIVIL ACTION, to recover land, heard before *MacRae, J.*, at January Term, 1889, of HALIFAX Superior Court.

The plaintiffs, other than J. J. Boone, are the heirs-at-law of Hardy Carlisle, who died in 1871, leaving a last will and testament, which was duly proven, in and by which he devised to his wife, who survived him, the land, the subject of this action, for her life, and the remainder thereof in fee to the defendant. The life tenant having died, the defendant took and had possession of the land at and before the

bringing of this action, and refused to give possession thereof to the plaintiffs, upon demand for the same.

The following is a copy of so much of the will mentioned as is necessary to set forth here:

"Witness, my hand and seal, this 7th day of January, 1871.

his
"HARDY + CARLISLE.
mark.

"Witness: W. H. JONES.

his
DAVID + LEWIS.
mark.

JAMES B. LEWIS."

The plaintiffs allege that the defendant is the same James B. Lewis who purported to be one and the third in order of the subscribing witnesses to this will, and insist that, therefore, the devise to him is void under the statute (*The Code*, § 2147).

On the trial the defendant introduced one W. H. Jones, who testified that the will of Hardy Carlisle was written by him.

The defendant then offered to prove, by this witness, that witness and David Lewis signed the will of Hardy Carlisle, as witnesses, in the presence of the testator; that the witness, seeing that David Lewis had signed by making his cross-mark, said it was necessary to have a witness to that cross-mark, and called upon the defendant to sign as a witness to David Lewis' cross-mark, and James B. Lewis, the defendant, signed the paper for that purpose only; that the testator did not request J. B. Lewis to witness his will, but did request W. H. Jones and David Lewis to do so, and that J. B. Lewis did not testify on the probate of said will.

Plaintiff objected; objection sustained, and evidence excluded. Defendant excepted.

There was a verdict and judgment for the plaintiffs.

The defendant appealed.

Messrs. W. H. Day and *T. N. Hill*, for the plaintiffs.
Mr. R. O. Burton, for the defendant.

MERRIMON, J. The statute (*The Code*, § 2147) provides that " if any person shall attest the execution of any will, to whom, or to whose wife or husband, any beneficial devise, estate, interest, legacy, or appointment of or affecting any real or personal estate, shall be thereby given or made, such devise, estate, interest, legacy, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person, or wife or husband, be void; and such person so attesting shall be admitted to prove the execution of such will, or the validity or invalidity thereof."

The obvious purpose of this provision is to prevent incentive to perjury, and ineligibility and incompetency of witnesses of wills, by reason of interest, who consented and undertook to be such at the time the will was executed. Such a witness, in all respects eligible, assumes a serious duty and a legal relation to the will, necessary to its validity, if there be but two witnesses to it, and an important one, however many there may be, that he cannot cast off and rid himself of, for any cause, at his will and pleasure; certainly not, unless he shall do so with the consent of the maker of the will in his life-time. The statute (*The Code*, § 2136) prescribes that all wills to be proven by attesting witnesses shall be " subscribed in his (the maker's) presence by two witnesses at least," &c. Thus it is made essential to have such witnesses—they consent to be, and subscribe the will in the presence of the maker for all proper legal purposes in that connection. They thus become identified with the will, and the law justly holds them to such relation, and the legal consequences of it. Otherwise, a witness might defeat it, after he had consented to witness, and had witnessed, its execution.

But such relation with the will must, indeed, exist—the witness must have consented to be, and must have subscribed to the will as a witness thereof in the presence of the maker of it. Otherwise, the subscriber is no such witness. It is not sufficient that the subscriber carelessly, or for some other purpose, wrote his name at or about the place where such witnesses usually subscribe their names, although, if he should do so, there might arise a presumption of fact, nothing to the contrary appearing, that he intended to become a witness.

There is neither principle nor statutory provision that, necessarily, makes a person a witness to a will *merely* because he subscribed his name in the place where such witnesses usually subscribe their names; nor that prevents the person whose name is so subscribed, or any person interested, from explaining how and why the subscription came to be made, and that, in fact, the person so subscribing was not a witness, as he purported by the writing to be. The subscription in such connection would be evidence—strong evidence—that the person subscribing intended to be a witness, but the contrary might be shown. And so, also, where the subscriber in such connection denied that he was such witness, it might be shown that he subscribed as such. And so, also, if the subscribing witnesses were dead, while the strong presumption would be that they were such, especially if there were a formal attestation clause, the contrary might be shown. Otherwise, the grossest injustice might be done to parties claiming under or against the will, and also to persons purporting to be witnesses, but really were not such, because of facts perfectly explicable. Theobald on Wills, 30; *In the Goods of Wilson*, 1 Court of Prob. and Div., 267; *Griffeths* v. *Griffeths*, 2 *ibid.*, 300; *In the Goods of Sharman*, 1 Prob. and Div., 661; *In the Goods of Murphy*, 1 Ir. R. Eq., 300; *Crowell* v. *Kirk*, 3 Dev., 355; *Old* v. *Old*, 4 Dev., 500; *Bell* v. *Clark*, 9 Ired., 239; *Hampton* v. *Hardin*, 88 N. C., 592.

It may be that, if one purporting to be a subscribing witness was examined in the course of the probate proceeding of the will, he could not afterwards be allowed to say that he was not such witness, upon the ground that it was settled and adjudged that he was; but certainly this cannot be so, when the person purporting to be such witness was not examined and not before the Court, as a third witness to the will need not be, where it is proven in *common form*. We cannot conceive of an adequate reason why such a witness, not so before the Probate Court, shall be precluded, after the will is proven, from proving, before a Court having jurisdiction, in a proper case, when it becomes material to do so, that he was not such witness. Not to allow him to do so, might do him grevious injustice. It is true, such a witness might have a strong motive, in that the testator devised or bequeathed to him property of great value, to commit perjury or to suborn witnesses, but this would weigh against him in addition to the presumption of fact that he subscribed as a witness. The burden of proof is on him, and the greater it will be if there was a formal attestation clause to the will. Moreover, the motive to commit perjury and prevent the cause of justice is not greater in such case than in many others of equal importance. The statutory provision first above cited does not, nor does any other, in terms or by reasonable implication, prevent the person purporting to be a witness to a will, from showing in any proper case that he is not such.

We are, therefore, of the opinion that the testimony offered by the appellant on the trial, which was objected to, and rejected by the Court as incompetent, should have been received. If it had been received, it would have gone directly to prove that the appellant was not requested by the testator, nor did he consent, to witness the will under which he claimed; that he simply witnessed the signature of a witness to the will who identified himself and the signature as his by his cross-mark, supposing that such attesta-

tion itself required a witness. The appellant was not examined, when the will was proven, as a witness thereto or at all. If the facts were as the evidence rejected tended to prove, he was not such witness, and, as we have seen, he had the right to prove that he was not. So far as appears, the evidence was competent, and should have been received.

The learned counsel of the appellees, in his elaborate and well-considered argument, cited and relied upon several English cases; but upon a careful examination of them, we do not think they seriously contravene what we have said. The case most relied upon is that of *Nigan* v. *Rowland*, 11 Hare, 157 (45 Eng. Chan. R., 158). In that case there was a complete formal clause of attestation; the witness, whose right was in question, attested the signature of the two subscribing witnesses to the will, who each made his cross-mark, but he did not subscribe in terms as a witness for that purpose. The *Vice-Chancellor* held, in an opinion of about half a dozen lines, that "upon the face of the document and of the attestation clause, the defendant Nigan must be held to be a witness to all that the clause contained." He gave no reason for, or explanation of, the ground of his decision, nor did he cite any authority. The case is not a satisfactory one, as it seems to us, and certainly does not harmonize with other English cases, some of which are cited *supra*. He admits the case is a hard one, and said that if the parol evidence were admissible, it would not be sufficient to countervail that which the written document afforded. It would seem that his decision could rest, properly, only on that ground. In *Cozens* v. *Crant*, L. J. (New Series), 840, the witness really subscribed his name as such to the will, and the *Master of the Rolls* held that, although the witness subscribed as a token of approval of the will, at the request of the testator, such attestation invalidated the bequest, the English statute being almost precisely like that of this State. In *Taylor* v. *Mills*, 1 Moody & Robertson, 288, it was held by

Lord DENMAN, C. J., that a devise to a subscribing witness to the will was void, although there were other witnesses sufficient in number to prove the will. He said to counsel: "You assume too much; the evidence of the devisee was not wanted on this particular occasion; but it might be wanted on other occasions. Supposing all the other subscribing witnesses should die, would not the evidence of this fourth interested witness then become necessary?" In *Bonfield* v. *Bonfield*, 32 L. J., 668, the witness really attested the will.

There is error. The appellant is entitled to a new trial, and we so adjudge.

Error. *Venire de novo.*

W. C. POWELL et al. v. W. B. ALLEN et al.

Abuse of Legal Process—Restitution, when Ordered—Amendment—Jurisdiction—Injunction.

1. A brought an action of claim and delivery before a Justice of the Peace, and took the property from the defendant under the process of that Court. Upon the trial, the Justice ruled that he had no jurisdiction, made an order of restitution, and gave judgment in favor of the defendant for $150, as the value of the property in dispute, to be collected in the event the property was not restored. A then brought an action in the Superior Court to restrain the collection of the judgment for $150. A restraining order was denied him, and he paid the $150. Afterwards the Judge permitted A to amend his complaint so as to set up the payment of the $150, and demand judgment for same: *Held*, (1) that denial of restraining order was proper; (2) that as the $150 was not paid until after the action was brought, it was error to allow the amendment; (3) that the allowance of such amendment was also erroneous because it changed the action and made it substantially a new one; (4) that the demand for the $150 sounded in contract, and therefore the Superior Court had no jurisdiction of an action to recover it.

2. A party will not be permitted to take any advantage obtained by the abuse of legal process, nor will the courts permit the opposite party to be prejudiced thereby.

3. The courts will promptly enforce restitution of property taken by abuse of legal process, and will not proceed to administer the rights of the parties until such restitution is made.

CIVIL ACTION, tried before *Avery*, *J.*, at April Term, 1888, of FRANKLIN Superior Court.

The plaintiffs brought their action in the Court of a Justice of the Peace against the present defendants, to recover possession of a mule and certain cotton, of greater value than $50, and under the ancillary proceedings of claim and delivery the property was delivered to the plaintiffs in that action, who are the plaintiffs in the present one. In the course of the action the Justice of the Peace dismissed the same, upon the ground that his Court had not jurisdiction of the cause of action, and gave judgment of restitution of the property against the plaintiffs, and an alternative judgment in that connection against them for $150 in favor of the defendant.

The plaintiffs having failed to restore the property to the defendants, an execution was issued upon the alternative judgment, and the Sheriff was about to enforce the same, when the present plaintiffs brought this action to obtain an injunction to restrain him from collecting the money, upon the ground that the property belonged to the plaintiffs, and if they paid the money they might not be able to recover the same, &c. A Judge at Chambers denied the motion for an injunction, pending the action, until the hearing upon the merits. Afterwards the plaintiffs paid the money in discharge of the alternative judgment, and, by leave of the Court, amended their complaint, alleging that money so paid belonged to them, &c.

On the trial, after the jury was empanelled, the defendants moved the Court to dismiss the action, on the grounds:

1. That the complaint did not state facts sufficient to constitute a cause of action.

2. That the alleged cause of action, to-wit, the collection of the sum of one hundred and fifty dollars, has arisen since this action was brought, as appears from the supplemental complaint.

3. That there is a want of jurisdiction, in that this Court cannot try an action to recover one hundred and fifty dollars, alleged to have been wrongfully paid to the Sheriff, when it appears that it was collected by the Sheriff, under process, rightfully issuing from the Court.

Thereupon the Court gave judgment for the defendants for costs.

Plaintiffs excepted to the ruling of the Court and the judgment, and appealed to this Court.

Mr. C. M. Cooke, for the plaintiffs.

Messrs. N. Y. Gulley and *F. S. Spruill*, for the defendants.

MERRIMON, J. (after stating the case). It is not alleged that the judgment of restitution and the alternative judgment mentioned in the complaint, before it was amended, were in any respect improper or subject to valid objection. Indeed, inasmuch as the Justice of the Peace decided that he had no jurisdiction of the cause of action and dismissed the action, it was his duty to require the property, improperly seized and placed in the possession of the plaintiffs in that action, to be restored to the defendants therein, and in case of default in this respect that the value of the property be paid to them.

The Court could not allow an improper and illegal use and abuse of its authority and process to prejudice a party, nor will it allow the moving party in such case to take advantage thereby. It will, on the contrary, and it is its duty, as far as practicable, to restore the parties to the same status

in all respects that each had when the authority of the Court was at first improperly exercised, and its process operative. Nor will the Court delay to do so, or allow its purpose to be obstructed in any way; its integrity, duty, and absolute fairness in all things alike prompt it to such a remedial course of action. Nor will it proceed to administer the rights of the parties until such restitution shall be made. *Perry* v. *Tupper*, 71 N. C., 385; *Manix* v. *Howard*, 82 N. C., 125.

The Court, therefore, properly refused to grant the injunction as demanded by the complaint.

It appears from the amended complaint, that the plaintiffs paid the defendants one hundred and fifty-eight dollars and seventeen cents in discharge of the alternative judgment mentioned, and they allege that the money thus paid belongs to them, and they seek to recover the same in this action.

There are two inseparable obstacles that prevent such recovery: First, the Superior Court did not have original jurisdiction of the sum of money demanded. It being less than two hundred dollars, was within the exclusive jurisdiction of the Court of a Justice of the Peace. This action is not brought to recover the property mentioned—the plaintiffs have that in their possession—but the money which they allege they ought not to have been required to pay, and therefore, the defendants have it as money had and received to their use. Waiving all possible tort, they contend that the law implies a contract or promise on the part of the defendants to pay them the money. The demand is not, therefore, for a tort, in any possible view of it, of which the Superior Court has jurisdiction. *Winslow* v. *Weith*, 66 N. C., 432; *Latham* v. *Rollins*, 72 N. C., 454; *McDonald* v. *Cannon*, 82 N. C., 245; *Burbank* v. *Commissioners*, 92 N. C, 257.

Secondly, the cause of action arose after the action began. It appears from the allegations of the amended complaint, that the money which the plaintiffs paid to the defendant,

and which they seek to recover, was paid sometime after this action was brought. It is settled that, ordinarily, the cause of action must have existed at the time the action began.

Moreover, the introduction of such new cause of action could not be allowed, the defendant objecting, because it changed the action and made it substantially a new one. This could not be allowed. *Kramer* v. *Electric Light Co.*, 95 N. C., 277; *Clendenin* v. *Turner*, 96 N. C., 416; *Glover* v. *Flowers*, 101 N. C., 134; *Bynum* v. *Commissioners*, *ibid.*, 412.

No error. Affirmed.

EDWARDS & MURCHISON v. RICHARD E. BOWDEN and his wife BETTIE J. BOWDEN.

Married Woman—Evidence to Rebut Fraud in Execution of Deed of.

When, in an action to foreclose a mortgage on land belonging to a married woman, she alleged that her signature to the mortgage was obtained by fraud of the plaintiff, and fear and compulsion of her said husband, &c., it was competent for the plaintiff to offer a deed executed by the *feme* and her husband, a year after the date of the mortgage, purporting to convey a part of the land embraced in the mortgage, for the purpose of paying a part of the mortgage debt, to rebut the testimony of the *feme* defendant tending to establish the truth of her allegations.

This was a CIVIL ACTION, for the foreclosure of a mortgage deed, tried before *Graves, J.*, and a jury, at Fall Term, 1888, of the Superior Court of GREENE.

Among other things, the defendant Bettie J Bowden alleged that she was a *feme covert* at the time the mortgage

was executed, and that the land attempted to be conveyed was her sole and separate property, and that her signature to said mortgage deed was obtained by the fraud and collusion of the plaintiffs, and the threats, fear and compulsion of her husband, and that her husband threatened to abandon and leave her unless she signed the mortgage to plaintiffs. It was alleged and proved that, at the time the *feme* defendant signed said mortgage, she was confined to her bed with sickness, and had been so confined for two weeks or more. There was no allegation or proof that the plaintiffs knew that her husband threatened to leave her if she refused to sign the mortgage to plaintiffs.

On the trial, plaintiffs offered in evidence a deed from plaintiffs and defendants to one Mary J. Pate, purporting to convey a part of the land attempted to be conveyed in said mortgage, and which was executed a year after the mortgage, for the purpose of raising money to pay off a part of said mortgage debt, for the purpose of rebutting the allegation that she signed said mortgage through fear of her husband, which evidence was objected to by the defendant, and rejected by the Court, to which ruling the plaintiffs excepted.

The defendant Bettie J. Bowden testified in her own behalf as follows: R. E. Bowden, my husband, brought the mortgage and said if I did not sign it he would leave me; Edwards, one of the plaintiffs, came in; I was sick; he talked to me much about his kindness to my husband; I told him I did not want to give a mortgage on my land; he said Bowden had given him an agreement to give him a mortgage on land; he said he would prosecute my husband for false pretence, and put him in jail if I did not sign the mortgage; my husband was in the habit of getting intoxicated, and when so was violent; I never signed the mortgage willingly and voluntarily; I was afraid he would do what he threatened.

Exceptions were taken by the plaintiff to the instructions given by the Court; but as the appeal is disposed of upon the exception to the exclusion of testimony, it is unnecessary to set out the charge here. There was a verdict for the defendants, and the plaintiffs appealed.

Mr. W. C. Monroe (by brief), for the plaintiffs.
Mr. G. M. Lindsey, for the defendants.

SHEPHERD, J. We are of the opinion that a new trial should be granted, because of the rejection of the testimony offered by the plaintiffs.

It is true, that if the deed were executed under duress, and for that reason void, it could not be validated by the fact which the plaintiffs sought to prove. But it was not offered for that purpose, but to rebut "the allegation that she signed said mortgage through fear of her husband." The alleged fact that, a year after she signed the deed which is the subject of this controversy, she voluntarily (as far as we can see) joined the plaintiffs in the execution of the rejected deed of mortgage upon a part of the same land, and for the purpose of paying plaintiffs' mortgage debt, would, it seems to us, be clearly relevant to the issue before the jury. They might well have inquired, why did she not repudiate the whole transaction instead of recognizing it by joining in the execution of the second deed? It may be that she could have fully explained her act so as to repel the imputed inconsistency; but, be that as it may, we think the plaintiffs were entitled to the testimony offered.

Error. *Venire de novo.*

DAVENPORT & MORRIS v. J. R. TERRELL.

New Trial—Judicial Discretion.

Granting a new trial, on the ground that the verdict is against the weight of the evideuce, is a matter within the discretion of the Judge below, and not reviewable, unless it appear that the Judge was influenced in the exercise of such power by an erroneous view of the law.

This was a CIVIL ACTION, tried on appeal from the Court of a Justice of the Peace, at the April Term, 1888, of the Superior Court of WAKE County, before *Shipp, J.*

The material facts are stated in the opinion.

Mr. W. J. Peele, for the plaintiffs.
Mr. C. M. Busbee, for the defendant.

AVERY, J. The record contains but one exception. After verdict for the plaintiffs, the defendant's counsel moved the Court for a new trial, because the verdict was against the weight of evidence. The motion was argued by counsel. During the discussion the Court (Judge) remarked that, if he had been on the jury, he would have found differently, but that it was a small matter, or that there was a small amount involved, and the case ought not to be tried again. The motion was not then disposed of, but afterwards the Court, upon consideration, and in the exercise of its discretion, discharged the rule for a new trial. Appeal by defendant.

On the argument in this Court, counsel raised no question as to the discretionary power of the Judge below to grant or refuse a motion of this kind.

We cite only one late case re-affirming the settled principle—*Redmond* v. *Stepp*, 100 N. C., 212. But when it appears

that the Judge was influenced in the exercise of such power by an erroneous view of the law, this ruling can be reviewed, and ought to be reversed on appeal in this Court. *Vest* v. *Cooper*, 68 N. C., 131. In the case before us, the rule for a new trial was discharged by the Court "*upon consideration and in the exercise of its discretion*," not at the time when the remark which is set forth in the assignment of error was made, but afterwards. We must accept the statement in the record, and as the motion was refused after deliberate consideration, and in the exercise of an admitted power, it is useless to speculate, as to whether there would have been error for which a new trial might be awarded, if it clearly appeared that his Honor was influenced by the consideration that only a small amount was involved in the controversy settled by the verdict.

No error. Affirmed.

PATRICK ELLINGTON v. H. H. ELLINGTON and W. N. ELLINGTON.

Idiots and Lunatics, Deeds by—Color of Title.

1. The deed of a person *non compos* is color of title, and possession under it for seven years ripens into title against those not under disability.
2. A cause of action, to set aside a deed executed by one alleged to have been *non compos*, arises immediately upon its execution, and the period within which the action may be brought is prolonged three years after the restoration of reason, or, if he continues insane, a like period for those to whom the estate would have descended.
3. When one who takes a deed from an alleged lunatic, and goes into the possession of the land described, would have been one of the heirs of the property in the absence of the deed, his possession is adverse, from the delivery of the deed, and the statutory bar of *seven years* is applicable in his favor, against those who would have been tenants in common with him.

ELLINGTON *v.* ELLINGTON.

CIVIL ACTION, tried before *Graves, J.*, at October Term, 1888, of the Superior Court of VANCE.

The complaint filed in this action, which was begun on December 17, 1887, alleges that Bevil Ellington, being the owner of the tract of land therein described, made up of several parcels and containing about 443 acres, by deed executed in October, 1865, conveyed the same to the defendants Horace Ellington, a son, and William N. Ellington, the husband of his daughter Polly, together with the stock, farming implements and other articles of personal property on the plantation, upon the sole consideration of the support of the grantor and his wife during the residue of their respective lives.

It avers further, in reiterated allegations, that the said Bevil was, at the time, advanced in age, of enfeebled mind and body, unable to understand and measure the consequences of his act, to manage and dispose of his property, from want of legal capacity; and was, moreover, susceptible to undue influence, taking advantage of which, the defendants, by false and fraudulent representations, and the exercise of that control which they had acquired over him, procured the making of said deed for the very inadequate consideration expressed therein.

It states that thereafter the said Bevil broke up farming and went himself to live with his son Horace, in whose house and with whose family he continued to reside until his death in August, 1869, while his wife went to, and took up her abode with, her daughter Polly, were she remained until her death in 1867.

The prayer of the plaintiff, also a son of the said Bevil, is, that said deed be declared and adjudged void for the causes aforesaid, and he be admitted to share in the said property, as in case of an intestacy, and for general relief.

The answer distinctly and in detail controverts all the averments as to an unsound mind and the want of legal

capacity in the said Bevil to make an effectual disposition of his estate; denies the exercise of, or attempt to exercise, any undue or improper influence in procuring the deed, and the alleged inadequacy of the obligation assumed as the consideration of the deed, and sets up a defence, under the statute of limitations, to the action, and the possession under the deed, which, if invalid, is color of title, for more than seven years before the institution of the suit.

The only issue submitted to the jury, and this without objection, was in these words:

"Is the plaintiff's cause of action barred by the statute of limitations?"

Under the instructions of the Court as to the law arising upon the facts admitted, as set out in the complaint, for the purpose only of raising the question of the effect of the lapse of time, and reserving the other matter in controversy in the pleadings, for further trial in the event of the defence under the statute, and from possession under the deed, being overruled, the issue was found in the affirmative.

Judgment being entered in conformity with the verdict rendered in pursuance of the direction given to the jury to so find, upon the facts stated in the complaint, the plaintiff, understood as excepting thereto, appeals.

Mr. J. B. Batchelor, for the plaintiff.
Mr. E. C. Smith, for the defendants.

SMITH, C. J. (after stating the case). From the time of making the deed the defendants held possession of the land thereunder until the death of the grantor in August, 1869, and thereafter for a period of more than seventeen years, during all of which, except a half month, the statute was in full operation before the suit was brought.

Assuming the deed to be voidable, the possession under it, as color of title merely, in the absence of any indication

of imperfection or infirmity apparent upon its face, would ripen into a good title after the expiration of seven years, unless, within three years after the "coming of sound mind," according to the Revised Code, ch. 65, § 1, and *The Code*, § 148 (the same language being used in each), the person so entitled commence his suit or make entry on the land. If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor

The cause of action to set aside the deed arises at once upon its execution, while the running of the statute was so far arrested in favor of the grantor, supposing him to be of unsound mind, as to admit of the prolonged period of three years after the restoration of reason, or, as we think, after death, to those to whom the estate would have descended, in the absence of any new interrupting personal disability, in which to institute suit. *Summerlin* v. *Cowles*, 101 N. C., 473.

In this view of the case, and aside from the claim of title under the deed, as affording color of title, with the support of the hostile possession held for the prescribed time, the bar to the action is complete and effective, whether the former statute or that substituted in *The Code* be applicable to the case.

While we deem the law settled in this State, whatever may have been the rulings elsewhere, by the case of *Riggan* v. *Green*, 80 N. C., 236, that the deed of one *non compos is voidable and not void*, it can make no difference when such is offered as evidence of color of title only, whether it be the one or the other, to sustain a possession under it.

Color of title, in connection with an adverse claim and occupation, has been held to perfect the title when furnished by a deed from husband and wife, when there has been no privy examination of the latter (*Pearce* v. *House*, 2 Hay., 386); when the deed was executed in the name of a principal, and the agent professing to have authority, had none to make it (*Hill* v. *Wilton*, 2 Murph., 14); when it was made by a person known by the grantee to have no title (*Reddick* v. *Leggat*, 3 Murph., 539); when the deed has never been registered (*Campbell* v. *McArthur*, 2 Hawks, 33; *Hardin* v. *Barrett*, 6 Io., 159; *Hunter* v. *Kelly*, 92 N. C., 285); when the deed is fraudulent and the possession has been adverse for the prescribed period, after a sale by the creditor (*Pickett* v. *Pickett*, 3 Dev., 6; *Hoke* v. *Henderson*, *ibid.*, 12); where the possession is under an act that is unconstitutional (*Episcopal Church* v. *Newbern Academy*, 2 Hawks, 233).

Color of title, as defined by GASTON, J., speaking for the Court, and with the hesitating assent of the Chief Justice, who favored a less circumscribed statement of the proposition, in *Dobson* v. *Murphy*, 1 D. & B., 586, requires a party to have "some *written document of title, purporting to pass the land, and one not so obviously defective that it would not have misled a man of ordinary capacity.*" Not dissimilar is the definition given in *Tate* v. *Southard*, 3 Hawks, 119.

The contention of counsel that, inasmuch as, but for the deed, the inheritance would descend to the plaintiff and defendants as tenants in common, the relation thus created prevents the statutory bar until after the expiration of twenty years, according to the ruling in *Hicks* v. *Bullock*, 96 N. C., 164; *Page* v. *Branch*, 97 N. C., 97, and *Breden* v. *McLaurin*, 98 N. C., 307, is not tenable. The adverse holding here is under a title derived from the deed, and began at its execution, and its character was not changed by the grantor's death. The estate in its entirety was in the defendants, and while the deed remained in force, there was no estate to

descend. The plaintiff, if his allegations were true, and the statutory bar did not intervene, could bring his action, as he does, to annul the conveyance, and the relations between him and the defendants would be hostile, as they were before, between the latter and the maker of the deed.

In no view of the case can the plaintiff prevail, and the judgment must be and is affirmed.

No error. Affirmed.

E. B. JORDAN v. JOHN W. BRYAN.

Review of Facts in Supreme Court—Landlord's Lien—Rent and Advances, when Payable—Waiver of Lien—The Code, §§ 1754, 1755, 1759.

1. The Supreme Court will not review the facts found by a referee, and adopted by the Judge below, in an action of claim and delivery.
2. Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had.
3. The landlord cannot bring claim and delivery for the crop before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop.
4. If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally.
5. Defendant cultivated plaintiff's land on shares during the year 1887; the plaintiff agreed to make, and did make, advances to defendant. The time agreed on when the advances should be due and demandable was *when all the crops were gathered and divided.* There was no agreement as to *the time when the crops should be divided.* Plaintiff and defendant divided the corn and defendant

removed his share thereof. On November 26, 1887, before all the crop was gathered, the plaintiff demanded the crops then gathered, and, upon defendant's refusing to surrender them, brought claim and delivery therefor: *Held*, (1) that the action was prematurely brought, because plaintiff's right to demand his rent and pay for advances did not accrue until the crop was gathered and ready for division; (2) that by dividing the corn the plaintiff waived and lost his lien on defendant's share thereof.

CIVIL ACTION, tried before *Avery, J.*, at October Term, 1888, of the Superior Court of the county of WAYNE.

The action commenced November 26, 1887, is brought to recover cotton, cotton-seed, corn and fodder, of the aggregate value of $117.50, as alleged in the complaint, which were taken under the ancillary proceeding of claim and delivery, but returned to the defendant, he having given the requisite undertaking.

There was a reference, under *The Code*, to W. C. Monroe, Esq., whose report of finding of fact was, in substance, that the defendant John W. Bryan cultivated the land of the plaintiff E. T. Jordan for the year 1887 on shares, the plaintiff agreeing to furnish the team and agricultural implements, and to furnish Bryan with supplies, and Bryan to furnish the labor.

The defendant raised on the land during said year a crop of corn, cotton, &c. (set out in full in the report), and the plaintiff advanced to the defendant the sum of $41.47. The plaintiff and defendant divided the corn, each taking his share thereof, and the defendant removed his part from the premises of the plaintiff before the bringing of this action. The plaintiff has received no other part of said crops. All the crops, except the defendant's part of the corn, were on the premises of the plaintiff at the time of bringing this action, and a part of the crop was ungathered. The defendant, after the bringing of this action, offered to the plaintiff his part of the fodder, cotton, and cotton-seed. * * * The

time agreed on when the advances made for 1887 should be due and demandable was when all the crops were gathered and divided. There was no agreement as to the time when the crops should be divided. * * * The plaintiff, before bringing this action, demanded the crops mentioned in the complaint of the defendant.

The referee found, as conclusions of law, that conceding that the agreement created the relation of "landlord and tenant" between the plaintiff and defendant, "the rent which the defendant was to pay was due and demandable on the 1st day of January, 1888, or at least not before the whole of the crop was gathered and ready for delivery, and the advancements when all the crops were gathered and ready for division; that by the division of the corn and delivery to each of his share thereof, the plaintiff lost all lien that he may have had on the share of the defendant therein for advances and rents out of other parts of the crop; that after the division of the corn and delivery to each of his part thereof, the defendant had a right to remove his part thereof from the premises of the plaintiff without paying for advances or the rent out of other parts of the crop, or giving the plaintiff notice, or gaining his consent to said removal; that until the crops were gathered and in condition to be divided, and up to the time when the rents or advances were due and demandable, the defendant was entitled to the actual possession of the crops, and the plaintiff only to the constructive possession thereof; that at the time of bringing this action, the plaintiff had no cause of action against the defendant for the detention of the property described in the complaint; that the defendant is entitled to the possession of the property described in the complaint; that John W. Bryan recover judgment against the plaintiff E. B. Jordan and his surety, N. G. Holland, for his costs."

The plaintiff filed the following exceptions to the referee's report:

1. That so much of his finding of facts as finds, that "the time agreed on when the advances made for 1887 should be due and demandable, was when all the crops were gathered and divided" is erroneous, as there was not sufficient evidence to support such finding.

2. That the conclusion of law of the referee which finds, "that the rent which the defendant was to pay the plaintiff was due and demandable on the first day of January, 1888, or at least not before the whole of the crops were gathered and ready for division, and the advancements when all the crops were gathered and ready for division," is erroneous.

3. That the conclusions of law which find, "that by the division of the corn and delivery to each of his share thereof, the plaintiff lost all lien that he may have had on the share of the defendant therein, for advances and rents out of other parts of the crop," are erroneous.

4. That the conclusions of law which find, "that after the division of the corn and the delivery to each of his part thereof, the defendant had a right to remove his part from the premises of the plaintiff, without paying for advances or the rent out of other parts of the crops, or giving the plaintiff notice or gaining his consent to said removal," are erroneous.

5. That the conclusions of law which find, "that until the crops were gathered and in condition to be divided, and up to the time when the rents or advances were due and demandable, the defendant was entitled to the actual possession of the crops, and the plaintiff only to the constructive possession thereof," are erroneous.

6. That the conclusions of law which find, "that at the time of bringing this action, the plaintiff had no cause of action against the defendant for the detention of the property described in the complaint," are erroneous.

7. That the conclusions of law which find, "that the defendant is entitled to the possession of the property described in the complaint," are erroneous.

8. That the conclusions of law which find, "that the defendant John W. Bryan recover judgment against the plaintiff E. B. Jordan and his surety N. G. Holland, for his costs," are erroneous.

His Honor overruled the exceptions of the plaintiff, and gave judgment for the defendant, from which the plaintiff appealed.

Messrs. W. R. Allen and *I. F. Dortch*, for the plaintiff.
Mr. W. H. Kitchen, for the defendant.

DAVIS, J. (after stating the case). The first exception is to the finding of fact when there was not sufficient evidence to support it. None of the evidence is sent up with the record, and the question sought to be raised by the first exception is not before us, and if it were, it is not for us to pass upon the weight of evidence.

By § 1754 of *The Code*, all crops raised on lands rented or leased "shall be deemed and held to be vested in possession of the lessor or his assigns at all times until the rents for said lands shall be paid," &c., and the "remedies in an action upon a claim for the delivery of personal property" are given to the lessor or his assigns, "against the lessee or cropper, or the assigns of either, who shall remove the crop or any part thereof, from the lands, without the consent of the lessor," &c. Section 1755 gives a like remedy to the lessee or cropper for the recovery of such part of a crop as he in law, and according to the lease or agreement, may be entitled to," whenever the lessor or his assigns "shall get the actual possession of the crop or any part thereof, otherwise than by the mode prescribed" in section 1754.

The case before us is clearly distinguishable from *Livingston* v. *Farish*, 89 N. C., 140, cited by counsel for plaintiff, and similar cases referred to. In that case the tenant was to pay 450 pounds of cotton as rent, and the rent and sums

advanced for supplies were to be *due* on the 1st day of October, 1881. The defendant cultivated and gathered the crop, and refused to "pay the rent and sum due for supplies."

The Court below instructed the jury "that the action of *claim and delivery* would not lie under the statute, unless some part of the crop had been removed from the premises by the defendant." By the terms of the agreement, the rent and supplies were due the 1st day of October, the crop had been gathered, and the landlord was entitled to the remedy by claim and delivery, not simply by virtue of his constructive possession under the statute, but by his right to the actual possession, the rent and advances having become due, and the refusal to deliver the cotton was a denial of the landlord's *rights* to possession, and by a fair construction of the statute this Court held, that he was entitled to claim and delivery, and the ruling of the Court below was reversed.

Though the constructive possession of the crop is vested by statute in the landlord, for the very obvious purpose indicated by the statute, of protecting his lien, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant, until such time as the rent and advances shall become due or a division can be had.

In *State* v. *Copeland*, 86 N. C., 694, it is said, "notwithstanding the provision of the first section (ch. 283, Acts of 1876–'77, now § 1754 of *The Code*), the whole tenor of the act contemplates the right of the lessee or cropper to hold the *actual* possession until such time as a division may be made," and this against the lessor himself. It was never contemplated that, while the crop remained on the land, with no attempt or purpose on the part of the tenant to remove or so dispose of it as to deprive the landlord of his security, he should have the remedy of claim and delivery.

The remedy was designated for his protection, and it cannot, either by the terms of the statute or by any fair con-

struction, be resorted to before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop; otherwise, the tenant might be sued for parcel of the crop as it was gathered. Neither the language nor the spirit of the statute will permit this.

If the tenant, at any time before satisfying the liens of the landlord, removes the crop, or any part of it, not only has the landlord the civil remedy given by the statute, but the tenant subjects himself to a criminal prosecution. *The Code*, § 1759.

Nothing of this kind is alleged by the plaintiff against the defendant in this case, and the foregoing declarations as to the law applicable to them dispose of the fifth, sixth, seventh and eighth exceptions of the plaintiff adversely to them.

We think the plaintiff's right to demand his rent and pay for advancements was when the crop was gathered and ready for division, and the second exception was properly overruled by his Honor.

The question involved in the third and fourth exceptions must also be disposed of adversely to the plaintiff—the division of corn by the plaintiff and defendant, "each taking his share thereof" to the appropriation, possession and removal of his "share thereof" by the defendant, and a recognition of his right thereto. *Curtis* v. *Cash*, 84 N. C., 41.

No error. Affirmed.

W. A. WHITEHEAD v. M. M. SPIVEY.

Practice—In Supreme Court—Motion to Amend Case on Appeal—Homestead—Fraudulent Conveyance—Estoppel.

1. A motion will not be entertained in the Supreme Court to allow an appellant to file a record of proceedings subsequent to the appeal, and independent of it, for the purpose of making a case here substantially different from the one tried in the Court below, nor will the case be remanded for a like purpose.
2. Where a judgment debtor has conveyed the tract of land on which he lived to a son, in fraud of creditors, and, after judgments were obtained and executions issued against him, other lands, valued at less than $1,000 by the appraisers, and not including that tract, were allotted to him as a homestead, and he made no exception thereto, he was *estopped* from claiming that the homestead should be extended to the land so fraudulently conveyed, and its sale under execution and Sheriff's deed would make a valid title in the purchaser.

This was an ACTION OF EJECTMENT, tried before *Philips, J.*, and a jury, at April Term, 1888, of the Superior Court of MOORE County.

The plaintiff introduced evidence tending to show that one J. B. Cole was the owner of the *locus in quo* in 1874. He then introduced a deed from said Cole to M. M. Spivey, dated September 16, 1874, conveying the *locus in quo* to him in fee. He then introduced evidence of a judgment in favor of W. A. Whitehead and T. H. McKay, partners, trading as W. A. Whitehead & Co., against said M. M. Spivey, for six hundred dollars ($600), rendered in this Court on August 12, 1878, and docketed August 19, 1878, upon two notes for three hundred dollars ($300) each, dated January 13, 1876, and due on the first day of April, 1876; and also of a judgment in favor of same plaintiffs and against same defendants and one D. M. Lemons, for one hundred and five dollars ($105) damages, rendered in this Court on August 4, 1879,

and docketed on August 20, 1879. That on each of said judgments an execution, returnable to the Spring Term, 1880, was issued to the Sheriff of Moore County, and that under them he caused the homestead and personal property exemptions of M. M. Spivey to be allotted on 16th day of December, 1879, the homestead being appraised at $766.

A copy of the homestead return is made a part thereof, together with the execution and return of the Sheriff thereon.

There was no evidence that said M. M. Spivey excepted to or appealed from the said allotment by the appraisers, or that he took any steps to have the allotment corrected or the deficiency made up.

The plaintiff further showed that executions issued upon said judgment, they being alive and not dormant, returnable to Fall Term, 1882, and that under those executions the Sheriff sold the *locus in quo* without further allotment of homestead, and that said W. A. Whitehead became the purchaser, and the Sheriff executed a deed to him, a copy of which is made a part of the complaint herein.

This testimony was admitted by the Court, after objection by defendants, for that it had already appeared in evidence of the plaintiff that only a partial homestead of $766 had been allotted under the former executions in the same cases, the Court reserving the question as to whether it should not be ruled out at a later stage of the trial.

The defendant then offered in evidence a deed from M. M. Spivey to Mack N. Spivey for the same land, dated June 10, 1877, and registered in Reg ster's office of Moore County.

The plaintiff attacked said deed for fraud, and offered evidence tending to show that the said deed was made between near relatives, at night, in secret; that it was not registered for three and one half years; that there was no change of possession; that M. M. Spivey was insolvent; that the price was inadequate, and that, in fact, but a small portion of the price had been paid, and that the deed was dated

and signed on Sunday; that said Mack N. Spivey had but little money with which to have purchased said land, and that there was no delivery of the deed by M. M. Spivey to Mack N. Spivey.

The defendant offered evidence tending to show that the land brought a fair price, and the money was paid, and that the date of the deed was a mistake, and that it was executed on Monday, June 11, 1877, instead of Sunday, and that the defendant had always resided in Moore County.

The Court instructed the jury as follows:

"The Sheriff's sale and deed under which the plaintiff claims are inoperative and void as against the defendants, because, upon the proofs introduced by plaintiff, it appears that no full homestead has ever been allotted to defendant in execution, but only a partial homestead, valued by the appraisers at $766, both executions having been issued by the plaintiff in the same case, and the plaintiff being the purchaser under both"; and directed the jury to find the first issue in favor of the defendant.

To all of which the plaintiff excepted. Verdict for defendant. Motion for new trial on account of error in Judge's charge, and error in his directing the jury to find in favor of the defendant.

Motion denied. Judgment for defendant, from which plaintiff appealed to Supreme Court.

In this Court the appellant suggested, upon affidavit, that since the appeal was taken the homestead has been revalued, and is laid off to the defendant; that the land has been resold, and the plaintiff has repurchased it, taking the Sheriff's deed therefor; and he asked to be allowed to file the return of the homestead proceedings and have benefit thereof in and of his appeal; if that cannot be allowed, that the case be remanded, to the end he can have benefit of the same in the Court below.

Messrs. J. W. Hinsdale, W. E. Murchison and *J. C. Black*, for the plaintiff.

Mr. R. P. Buxton, for the defendant.

MERRIMON, J. (on the motion above stated, in this Court). The motion must be denied. The appellant seeks to help his cause of action and his case, in this Court, by introducing here, summarily, substantially a new cause of action, one that has arisen since this action began, and since this appeal was taken. The defendant has had no opportunity to contest its application or bearing in this action. Indeed, the effect of allowing the motion as to this Court, might, probably would be, to recast the action in material respects, and allow the plaintiff to assign new grounds of error as to rulings never made in the Court below. This could not be thought of for a moment. Nor will the Court remand the case for the purpose mentioned.

In the Court below it would appear that the case had been tried upon its merits, as presented by the pleadings, and the plaintiff could not avail himself of the new cause of action, and one too, arising after the action began, and since the trial therein. The Court would not allow a new and distinct cause of action to be introduced into the action, and especially, one that has arisen since the action began. This would be subversive of settled methods of procedure, and tend to confusion.

This application is very different from the case of *Holley* v. *Holley*, 96 N. C., 229. In that case it appeared that the very matter in question by the appeal had been settled and disposed of in another action, and the pendency of the latter action was pleaded. The purpose of remanding the case was to allow the adjudication of the very matter in controversy to be made to appear, and thus prevent the readjudication of the same matter.

Motion denied.

AVERY, J. (on the merits of the appeal). We think that his Honor erred, when he told the jury that the Sheriff's deed for the land in controversy was inoperative, and did not vest the title in the plaintiff, because the two other tracts allotted to the defendant as a homestead were valued by the appraisers in the aggregate at only seven hundred and sixty-six dollars.

In the case of *Spoon* v. *Reid*, 78 N. C., 244, the facts were, that the plaintiff owned a tract of land, on which he lived, and two other tracts. He allowed his homestead to be allotted in the two tracts, and conveyed his home place to his daughter to defraud creditors.

The transcript in that case shows, also (what does not appear in the reported case), that the two tracts allotted were valued in the aggregate at only five hundred dollars. In delivering the opinion of the Court, Justice READE says: "Without affecting the conclusion at which we have arrived, it may be conceded, that he had never conveyed his home place in fraud nor at all, but that he owned it, and lived upon it at the time of the levy and sale, and yet he could not recover, for when the allotment was made to him in the other two tracts by the Sheriff's appraisers, and he took no exceptions thereto, and no appeal therefrom, and disclaimed title to the home place, and claimed no homestead therein, he assented to and was bound by the allotment, and the same is an estoppel of record against him." The principle is sustained, too, by *Burton* v. *Spiers*, 87 N. C., 87.

It would be unreasonable, and productive of endless cheating, to concede to the debtor the power, after a fraudulent alienation of the most valuable portion of his land and the selection of two small tracts, worth less than one thousand dollars, to be allotted by the appraisers, to change his plans, when the fraud is exposed, and get, as against his creditors, all the advantage he would have had if he had, in the exer-

cise of his right, selected his homestead in the tract he attempted to convey.

The statement of the proposition shows that the law, if so construed, would encourage such efforts to defeat creditors, because the debtor would take the chance of success without incurring the least risk of paying any penalty in case of exposure.

But the report of the appraisers, being admitted to be in regular form, operates to estop the defendant from claiming any additional allotment in this Court, whether the deed to his son was valid or void. If it was not a fraudulent conveyance, of course the plaintiff could not recover.

As the defendant cannot, by reason of the estoppel, claim that any portion of the land in controversy shall be added to his homestead, we find it unnecessary to follow counsel in mere speculations as to whether land, acquired after an allotment like this, could be added to make up the full value of one thousand dollars, and, if so, whether it would be done only on the petition of, or at the request of, the owner. We must meet the numerous questions presenting new phases of homestead litigation, and decide them, when they are properly raised.

The Judge ought to have allowed the jury to determine whether the deed executed by the defendant to his son was fraudulent and void, and should have instructed them, if they found it was executed to hinder, delay and defeat creditors, to find the first issue for the plaintiff.

There was error, for which a new trial will be awarded.

Error. *Venire de novo.*

BAKER, NEWELL & WALLACE v. H. C. BREM et al.

Judge's Charge—Demurrer to Evidence—Warranty, Action on—Surety and Principal.

1. In an action for the recovery, as damages, of the price of an article of personal property, which, it was alleged, and proof offered to show, was sold, with other property, to the plaintiff, *all guaranteed to be first-class*, and that the article was returned as not first-class to defendant, by his instructions, and these facts being controverted, and the issues, was the article first-class, and what damages, if any, has plaintiff sustained? *Held*, that instructions to the jury, that if they believed the evidence, the plaintiff was not entitled to recover, would have been *impertinent*, it being the province of the jury to pass upon the issues, and of the Court to determine upon the right of recovery from the facts found.
2. In such case the proper way to raise the question of plaintiff's right to recover was to demur to the sufficiency of the evidence, as explained in the dissenting opinion in *McCanless* v. *Flinchum*, 98 N. C., 358.
3. It was proper to instruct the jury, that if the article was returned to the defendant as unfit for its intended uses, under his instructions, it was a rescission *pro tanto* of the contract, and plaintiff was entitled to recover the amount he had agreed to pay for the same, it appearing that his note covering the amount had been assigned, before maturity, to an innocent third party.
4. Plaintiff having been sued by the endorsee of his note, and judgment obtained against him, the endorser is sufficiently protected against his suretyship for plaintiff by a stay of execution of plaintiff's judgment against him, on his guaranty of the article for which the note was given, until plaintiff has satisfied the endorsee's judgment.

CIVIL ACTION, tried before *Boykin, J.*, at February Term, 1888, of the Superior Court of MECKLENBURG.

The action was begun August 15, 1885, and the complaint, filed on oath, alleges that the plaintiffs, J. R. Newell, N. W. Wallace and I. R. Baker, intestates of the plaintiff M. E. Baker and L. W. S. Taylor, entered into an agreement with the defendants H. E Brem and F. B. McDowell, constituting the partnership firm of Brem & McDowell, agents of the Watertown Engine Co., in this form:

"An agreement, made and entered into by and between Brem & McDowell, of Charlotte, N. C., agents for Watertown Engine Co., and Baker, Newell and Wallace, of the other part, witnesseth:

"That the said Brem & McDowell agree to furnish the said Baker, Newell & Wallace the following: One No. 4 mounted engine, for six hundred and ninety dollars, one No. 3-4 wheel separator, for two hundred and ten dollars, one belt 90 feet for ten dollars, total nine hundred and ten dollars ($910), all guaranteed to be first-class machinery, and engine to give full six-horse power, to be ready at Charlotte, on or about the 2d day of July, 1883, for the consideration of the payment of nine hundred and ten dollars, as follows: Four hundred and fifty-five dollars, payable October 15, 1883, without interest, and four hundred and fifty-five dollars October 15, 1884, at interest at eight per cent. per annum from July 2, 1883.

"Note to bear even date with bill lading, at interest at eight per cent. per annum from July 2, 1883.

"The condition of the above contract is, that the legal title and right to the above described property is to remain to be vested in Brem & McDowell, Charlotte, N. C., until all deferred payments or notes are fully paid; and in default of any or all of the payments for said property, as agreed, you or your agent may, without process of law, take possession and remove said property, and retain any payment that may have been made on account of said property, in lieu of its use or of charges and damages on same. This order constitutes and contains the only agreements made in relation thereto, verbal statements to the contrary notwithstanding.

"In witness whereof, the parties hereunto have set their hands, this 2d day of July, A. D. 1883.

BREM & MCDOWELL, [L. S.]
Shipping Address: J. R. BAKER, [L. S.]
J. A. NEWELL, [L S.]
N. W. WALLACE. [L. S.]"

3. That shortly thereafter N. W. Wallace executed and delivered to Brem & McDowell the two following described papers, to-wit:

"$455. CHARLOTTE, N. C., July 2, 1883.

"On the 15th October, 1883, we promise to pay to Brem & McDowell, or order, four hundred and fifty-five dollars, for value received, negotiable and payable at the Commercial National Bank, of Charlotte, N. C., with interest after maturity at the rate of eight per cent. per annum until paid, for money loaned.

"Due Oct. 18, '83. BAKER, NEWELL & WALLACE."

Another note of same date and tenor, payable October 15, 1884.

4. That J. R. Baker has since died, and M. E. Baker and L. W. S. Taylor administered on his estate; that the defendant, in pursuance of the said contract, delivered to the plaintiffs Newell & Wallace, and the plaintiffs Baker & Taylor's intestate, J. R. Baker, an engine and separator (or threshing machine).

5. That the engine was satisfactory, and plaintiffs paid for it as agreed in said contract.

6. That the separator or threshing machine was not satisfactory, but was an inferior machine, and not suited to the work intended to be done by first-class machines.

7. That the plaintiffs so reported to the defendants, and at their solicitation kept the machine on trial for about eight or ten days, when, finding that it would not serve the purpose or do the work of a first-class machine, plaintiffs, under instruction of defendants, returned the machine to the defendants.

8. That plaintiffs paid in full for the engine, under the contract, and have since been sued by the Watertown National Bank, and judgment rendered against them, in a Justice's Court, for the full amount of the machine, alleging

that the paper-writing signed by N. W. Wallace was a negotiable paper, and assigned to it, the Watertown National Bank, for value, before due, and without notice.

9. That by reason of the failure of defendants to comply with their contract, the plaintiffs have been damaged in the sum of three hundred dollars.

Wherefore, plaintiffs demand judgment:

1. For the sum of three hundred dollars damages.
2. For costs of action.

The answer of the defendants, also sworn, admits the allegations contained in the first five articles of the complaint, and controverts those made in the residue of the complaint, giving a different version of the facts therein stated, except as to the pleadings, admitting the allegations in article eight, and denying those made in article nine.

It also sets up matters constituting a counter-claim, which it is unnecessary to mention, as it is eliminated from the controversy which the defendants' appeal brings up for determination.

At Spring Term, 1888, after successive continuances, the cause came on for trial, before the jury, of certain issues raised by the pleadings, which, and the responses thereto, are as follows:

1. "Was the separator described in the complaint a first-class piece of machinery?" The jury say, "No."

2. "What damage, if any, have the plaintiffs sustained?" The jury respond, "Two hundred and ten dollars and interest."

The record shows no exceptions to the admission or rejection of evidence offered or refused during the examination of witnesses, or to the reception of documentary proofs, the assignment of error being to the refusal to give the instructions asked for defendants, and in the directions which, instead, were given.

There was no complaint as to the machine, but the plaintiffs claimed, and introduced witness to prove, that the separator, called by them the thresher, was not, as guaranteed in the contract to be, "*first-class machinery*," and did not perform its work properly; and that, in consequence, it had been returned to the defendants. Opposing testimony was offered by the defendants, both as to the quality of the article and its return to and acceptance by them.

It appears that the purchase money embraced in the notes has all been paid but the $210, the price of the separator, with the accruing interest, the note containing which was endorsed by the defendants, before maturity, to their principal, the Watertown Engine Co, and by it to the Watertown National Bank. For this contested balance suit was brought in January, 1885, against the original makers of the note, in the Court of a Justice of the Peace, and the liabilities of the defendants to the endorsee denied. Judgment was recovered in the action, from which an appeal was taken, and execution stayed, by the filing of a justified undertaking to secure the debt and costs, if recovered in the Superior Court. It was there tried, and the residue due on the note, $276.74, recovered, at the same term at which was tried the action now under consideration.

The defendants requested his Honor to instruct the jury as follows:

"1. That if the jury believe the evidence, the plaintiffs are not entitled to recover.

"2. That the plaintiffs, not having paid the purchase money, are not entitled to recover any damages."

These instructions were refused, and defendants excepted.

His Honor instructed the jury as follows:

"That, by the terms of the contract set out in the complaint, the defendants warranted the machine to be a first-class machine; that if the jury should find that the machine was not first-class, and if the machine was returned under

the instructions of the defendants, then the plaintiffs would be entitled to recover $210, the amount agreed to be paid for the same; but that, if the machine was not returned under the instructions of defendants, then the plaintiffs would be entitled to recover the difference between the value of the machine, as warranted, and the value as it was."

The Court then instructed the jury as to what constituted a first-class machine, as to which there was no exception.

The jury responded to the issues in favor of the plaintiffs, as set out in the record, assessing damages at $210.

Motion by defendants for a new trial. Motion refused.

Judgment for the plaintiffs, from which defendants excepted and appealed, and assigned the following errors:

1. That his Honor refused the instructions prayed for by plaintiffs, as set out above.

2. For error in charging the jury that, by the terms of the contract set out in the complaint, the defendants warranted the machine to be a first-class machine.

3. For error in charging the jury that, if the machine was not a first class machine, and if the defendants instructed plaintiffs to return the machine, then the plaintiffs would be entitled to recover the amount ($210) agreed to be paid for same.

4. For error in charging the jury that, if the machine was not a first-class machine, and if it was not returned under instructions from the defendants, then the plaintiffs would be entitled to recover the difference between the value of the machine, as warranted, and its value as it was.

No counsel for the plaintiffs.

Messrs. H. C. Jones and *C. W. Tillett*, for the defendants.

SMITH, C. J. (after stating the case). We again call attention to the form of the instructions and their inappropriateness to the issues before the jury. The inquiry before

them was as to the quality of the separator and its fitness for the purpose of cleansing small grain from the straw, for which it was bought, and whether it was, as represented, a first-class article, and if not, the compensatory damages due to the plaintiffs; and to either inquiry of fact, the instruction was wholly impertinent. The jury were not to pass upon the plaintiffs' right of action, but to accertain the facts, and then upon the whole case it became a question of law, to be determined by the Court in rendering judgment. The proper mode of raising the question as to the right of recovery was to demur to the sufficiency of the evidence adduced, assuming the facts to be as the jury would be warranted in finding them for the plaintiffs, to authorize judgment for them. The practice, in the case of such demurrer, not unlike a motion for a nonsuit at the close of the plaintiff's evidence, is explained in the writer's dissenting opinion in *McCanless* v. *Flinchum*, 98 N. C., 358. There would be no error, then, in declining to tell the jury that, taking all the evidence together, the plaintiffs could not recover—that is, could not have judgment, for with the results of their finding they had nothing to do, but only to respond to the inquiries submitted. The present practice undertakes, so far as it is practicable—unlike that of which it takes the place—to separate the facts from the law, the jury finding the one, when in dispute, the Court determining the law upon the facts ascertained by the jury and those admitted. But the point intended is reached in the instructions given and the exceptions taken to them. If these are correct in law, and the jury not misled, the verdict must stand with the judgment authorized by it.

In our opinion, the law was properly expounded, and no error is found in the directions under which the jury were led in arriving at their verdict. If the separator was returned to the defendants as unfit for its intended uses, under their instructions, it was a rescission *pro tanto* of the

contract, as much so as if it had not been included therein, and the obligation to return the purchase money, if it had been paid, or to enter a corresponding credit upon the note, which would have extinguished the debt, if it had not been, would be the result. But the defendants, not retaining possession of the note, transferred it, by endorsement before maturity, to an innocent holder, unaware of any infirmity, and thus put it out of their power to make the credit themselves and the power of the plaintiffs to be relieved, as, notwithstanding resistance to the judgment, was determined in the action of the endorsee bank. They cannot find relief from the judgment recovered by the bank, which discounted the note before it became due, and their only recourse is to the payees, who have converted the security to their own use and subjected the plaintiffs, to whom the money ought to be refunded, to the necessity of meeting the judgment against them. As a transaction between the parties to the contract, the return of the purchase money assumed a legal obligation, created by the very act of the surrender and receiving back of the instrument. The contention of the defendants, based largely on the case of *Osborne* v. *Gants*, 60 N. Y., 540, is not supported by the ruling in that case, which simply decides, that in an agreement concerning stipulations, interdependent and mutual, one cannot recover without performance of his contract, or an offer to do it, and that a warranty of quality is an incident only of an executed contract of sale, passing title to the thing sold.

The instruction applies, and such the verdict shows was the understanding of the jury in rendering it, to the case of an instrument, not such as represented and guaranteed, returned, by their direction, to the guarantors, and by them received—in legal effect a rescission of the contract so far as it refers to the defective article—restoring it to the defendants and binding them to restore the sum to be paid for it to the plaintiffs.

We do not appreciate the force of the objection based upon the fact that, as endorsers, the defendants became liable as sureties to the holder to the plaintiffs' whole cause of action. If the distinction prevailed, as formerly, between suits at law and suits in equity, it is obvious this, in an action at law, was indispensable in order to show a breach of contract and the damages consequent on it; and then, if the present plaintiffs were insolvent, the defendants' equity would be to restrain the enforcement of the judgment until the sureties were exonerated from their liability as such. In such case the defendants would be allowed to retain their indebtedness as an indemnity against loss by reason of their suretyship. The principle which regards the surety as a principal in such case is declared in *Williams* v. *Washington*, 1 Dev. Eq., 137; *Williams* v. *Helme*, *ibid.*, 151; *Walker* v. *Dicks*, 80 N. C., 263; *Scott* v. *Timberlake*, 83 N. C., 382.

It does not appear that as endorsers the defendants have been sued, and the judgment for the amount due on the note, against the plaintiffs, seems to have had the additional security furnished by the *supersedeas* appeal undertaking.

But whatever may be the hazard existing, and voluntarily assumed, without the plaintiffs' privity and for the defendants' sole benefit, in effecting the discount, the issuing of the execution is restrained, as would a court of equity interfere by an injunction in case of threatened loss, until the defendants are releived of their liability upon the note. At least, the appellants have no just cause of complaint, in that they are fully protected against contingent loss by the stay of execution. This is another instance shown of the full protection afforded litigants, in the double exercise of legal and equitable functions, in a single suit, which formerly required two.

No error. Affirmed.

P. H. WARLICK et al. v. J. J. PLONK.

Insanity—Hung Jury, Instructions to—Statute of Limitations—Revised Code, ch. 65, § 1; *The Code*, §§ 148, 163.

1. In an action of ejectment defendant relied upon adverse possession and the statute of limitations. Plaintiff relied upon the insanity of his ancestor, against whom the land was held adversely, to rebut the plea of the statute. On the question of insanity the Court charged the jury, that if the alleged insane person was so mentally diseased that he was unable to understand and assert his rights, that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in possession thereof asserting title thereto, and that such possession would destroy his rights, then he labored under such disability as would prevent the operation of the statute: *Held*, that the charge contained nothing of which plaintiff could complain.
2. The Judge said to a hung jury, that it was their duty to agree if possible; that no juror, from mere pride of opinion, should refuse to agree, but he was not required to surrender conscientious views founded on evidence; that it was the privilege and duty of each juror to reason with his fellows concerning the facts in the case, with an honest desire to arrive at the truth and a verdict: *Held*, that such charge was free from objection.
3. If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their right to recover will be barred. Revised Code, ch. 65, § 1; *The Code*, §§ 148, 163.

CIVIL ACTION, tried before *Boykin, J.*, at Spring Term, 1888, of CLEVELAND Superior Court.

The plaintiffs, as heirs-at-law of Christy Eaker, who died in 1885, intestate, derived title to the land sued for, under a grant from the State, and successive intermediate conveyances terminating with their ancestor. The defendant claims it under deeds from one Neal to Alex. Norton, dated in 1847, from Norton to Froneberger, made in 1856, and from the

latter to himself, executed the same day, and an alleged continuous and adverse possession from the year 1847 to the death of said Eaker. To rebut the effects of this hostile occupation, the plaintiffs introduce evidence to show the insanity of Christy Eaker, and his mental incapacity to understand and enforce and defend his rights in the premises, during an interval of more than fifty years, from 1831 to the time of his death, so that, the present action having been commenced on July 17 of the same year, the running of the statute to protect the defendant's possession has been arrested, and no bar is interposed to prevent the plaintiffs' recovery. The defendant offered testimony in disproof of this contention as to the mental condition of the deceased.

The controversy, in different forms, was tried before a jury at Spring Term, 1883, of the Superior Court of Cleveland, upon issues in which the findings are, that the adverse possession of the premises was in the plaintiffs' ancestor for a period of seven years previous to April 1, 1847, and thereafter for a similar period in the defendant and those from whom he claims.

The essential matter in dispute is, the alleged mental infirmity of the said Christy Eaker, and its effect in saving his rights from the operation of the limitations of the statute, which are in this feature unchanged, as found in the Revised Code, ch. 65, § 1, which exempts persons who are "*non compos mentis*," and in *The Code*, § 163, which exempts such as are "insane," and both allow three years after the person under the disability, "coming of sound mind, during which he may bring his action." Revised Code, ch. 65, § 1; *The Code*, § 148.

The issue of fact involving this question was put in this form:

"Was Christy Eaker mentally incapable, at all times since April 1, 1847, up to seven years prior to his death, of prosecuting and defending his right?" The response was in the affirmative.

The Court charged the jury, that if the said Christy Eaker labored under the disability of insanity during the time between the years 1831 and 1885, the plaintiffs, his heirs-at-law, would be entitled to the verdict, although the defendant had possession and occupied the said land as contended. That if he was so mentally diseased as to be unable to understand and assert his rights, the possession of the defendant could avail him nothing in this action. That if it should be proved that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in the possession thereof asserting title thereto, and that if he could not, by reason of mental disease, understand that such possession threatened and eventually would destroy his rights thereto, then, in that event, the plaintiffs would be entitled to recover, inasmuch as their ancestor labored under such a disability as would prevent the operation of the statute of repose.

The defendant excepted to that part of the charge referring to the degree of mental capacity necessary, &c.

The jury remained out an entire night. When Court convened the ensuing morning the jury came into Court, and were asked if they had agreed. They responded in the negative. The Court inquired if the diversity of opinion among them was such, in their opinion, as to render an agreement improbable. A juror responded that they stood nine to three. This was not in response to any inquiry on the part of the Court, as to how the panel then was, on the issue submitted. No such inquiry was made.

The Court then remarked to the jury, that it was their duty to agree, if possible; that no juror, from mere pride of opinion, hastily expressed during the consultation, should refuse to agree; that no juror was required to surrender any conscientious views, founded on evidence, he might entertain concerning the case; that it was the privilege, and, indeed, the duty of each juror to reason with his fellows

concerning the facts in the case, with an honest desire to arrive at the truth, and with the view of arriving at a verdict.

The defendant excepted to the remarks of the Judge to the jury.

The jury retired, and, after further deliberation, returned a verdict for the plaintiffs.

Rule for new trial by defendant. Rule discharged.

Judgment for the plaintiffs. Appeal by defendant.

Mr. W. P. Bynum, for the plaintiffs.

Mr. W. A. Hoke, for the defendant.

SMITH, C. J. (after stating the case). Without instituting an inquiry into the nature and extent of the disability which gives immunity to persons, thus designated in the statute, from the consequences of delay in bringing suit when their rights of property are involved, we think the instruction of the Judge leaves nothing unsaid or given of which the appellant can complain. Quite as unfounded is his exception to what was said and done when the jury came into Court and announced their failure to agree upon a verdict. The directions given them were entirely fit and proper, as tending to bring about unanimity of opinion, after a full and free interchange of views among the jurors, and to prevent unnecessary mistrials.

But the verdict upon the issue of the insanity of the deceased is imperfect, and leaves undetermined the state and condition of his mind during the seven years next before his death. It establishes the insanity up to the beginning of this period, while the charge explicitly requires a finding of this fact up to the year 1885, and we are at a loss to know why the issue was framed so as not to embrace this additional time. If any inference is to be drawn from this omission as intentional, and not the result of inadvertence, it

would be that the insanity did not continue until death, but that reason was restored during life. If, then, the deceased recovered from this disability, and became of sound mind for a period of three years before the suit was begun, the bar would become complete, and the right to recover the land lost. But the case shows no change of mental condition before death, and the instruction covered the entire period up to death, during all of which a continuance of the unsound mind is made a condition of the plaintiffs' right of recovery.

The discrepancy does not admit of our acceptance of the finding of the issue, as a basis on which to render a final judgment in the cause, and we feel constrained to consider this *lapsus* as an imperfection in the form of the issue tendered, and followed by a corresponding imperfection in the finding of fact, the correction of which can be made only by sending the cause back, to the end that a proper issue be submitted to the jury.

The judgment must be reversed, and a new trial had, and it is so adjudged.

Error. *Venire de novo.*

A. G. THORNTON v. J. A. LAMBETH and C. P. VANSTORY.

Practice in Supreme Court; When Opinion Given, although Appeal Dismissed—Premature Appeal—Partnership—Liability of Firm for Goods Sold One Member.

1. Although an appeal before any judgment is rendered below is premature, and will be dismissed, yet, when it appears that a decision by this Court of the point intended to be raised by the appeal will practically terminate the action, the opinion of the Court will be given.
2. When one partner buys goods for the firm, and they are used for partnership purposes, but he gives his individual note for the price, he is entitled to have the note paid out of the partnership assets.
3. When one member of a firm buys goods on his own credit, without disclosing to the seller the fact that he is a member of a partnership, and the goods are used for partnership purposes, the firm is liable to the seller. In order to exempt the firm from liability, it must be shown that the seller knew of the partnership and elected to give credit to one partner alone.

CIVIL ACTION, tried before *Philips, J.*, at May Term, 1888, of CUMBERLAND Superior Court.

This was a civil action in the nature of a bill of equity, to close a partnership between the plaintiff A. G. Thornton and the defendant J. A. Lambeth, and for an account of partnership dealings.

The facts appear in the opinion. Defendant appealed.

Mr. R. P. Buxton, for the plaintiff.

Messrs. Thomas H. Sutton and *J. W. Hinsdale*, for the defendants.

DAVIS, J. This action was originally commenced against the defendant Lambeth for the settlement of a partnership account. It was alleged that the plaintiff and defendant

were partners, and, among other things, that, with the exception of property of small value, the defendant was in the possession of the partnership assets, and refused to render an account. It was further alleged that he was insolvent, and judgment was demanded for an account, and, also, that the defendant be enjoined from disposing of the partnership effects, and for the appointment of a receiver.

The defendant answered, admitting some and denying others of the allegations of the complaint.

A temporary restraining order was granted, and, upon its return and a hearing upon affidavits, it was found as a fact that the plaintiff and defendant entered into a copartnership for the purpose of buying and selling horses and mules, by the terms of which the defendant was to furnish the capital and the plaintiff his services in the prosecution of the partnership business, and the profits arising therefrom were to be equally divided. It was further found that the partnership effects, with exceptions named, were in the hands of the defendant, and that he refused to account and settle with the plaintiff.

An order was made appointing a receiver to collect and take charge of the partnership assets, and, by consent of parties, there was a reference to take and state an account of the copartnership, &c. The referee filed his report, from which it appears that a number of exceptions were made by the plaintiff to his ruling. Among other things, the referee found as a fact that the defendant, during the existence of the partnership, gave to C. P. Vanstory two promissory notes, aggregating $1,078.70, signed by himself alone, and that they "were given for stock purchased of Vanstory and used in the partnership business," and that said notes, except $100, remain unpaid.

He finds as a conclusion of law that these notes are partnership liabilities, and must be paid out of the partnership assets.

By motion in the cause, Vanstory was made a party defendant, and he filed an answer, asserting his claim and right to have it discharged out of the partnership assets.

It was admitted that the defendant Lambeth is insolvent, and it was agreed that, if the finding of fact and conclusion of law by the referee in regard to the Vanstory debt, excepted to by the plaintiff, should be sustained, it would obviate the necessity of passing upon the other exceptions, and, upon being heard before Philips, Judge, at May Term, 1888, of the Superior Court of Cumberland County, he gave judgment sustaining the ruling of the referee, and the defendant appealed.

The case states that "the insolvency of Lambeth was admitted, and that the plaintiff never asked for a personal judgment against him," and it appears that the only thing settled by the Court below is, that "C. P. Vanstory recover of said partnership of J. A. Lambeth and A. G. Thornton, trading as J. A. Lambeth, the sum of $978.20, with interest from April 1, 1887. The receiver will pay over to said C. P. Vanstory the sum of money in his hands, not in excess of costs and expenses."

The action was brought for an account and settlement of the partnership, and, whether the defendant be insolvent or not, there should be some judgment finally disposing of the action; and counsel for plaintiff in this Court insists that he is entitled to judgment against the defendant for the balance reported in his favor, without reference to the solvency or insolvency of the defendant.

We think the appeal should be dismissed as prematurely taken, or the case remanded, to the end that such judgment may be rendered as will, if not appealed from, or, if affirmed on appeal, determine the action, and it is agreed that the decision of the Court upon the question raised by the Vanstory claim will practically put an end to the controversy. We will dismiss it with our opinion upon the point intended

to be raised. This course is warranted by precedent. *State* v. *Divine*, 98 N. C., 778; *Railroad* v. *Reidsville*, 101 N. C., 404.

The business of the copartnership was that of trading in horses and mules, and the notes given to Vanstory were for the purchase of stock used in this business. It appears from the account filed, that Lambeth was the purchasing partner for the firm, for nearly the whole of his credits, amounting to over $14,000, were for horses and mules purchased for the firm, many of them from Vanstory, and sold by the firm.

That one partner has the right to have the partnership effects applied to the discharge of partnership debts, when necessary for that purpose, is too plain to be questioned. It is equally clear that when partners are to share in the profits of the partnership business, there can be no such thing as "profits to be equally divided," till the partnership debts are paid and all its liabilities discharged. But it is insisted for the plaintiff, that Vanstory accepted Lambeth's notes in payment for the horses and mules, and thereby gave credit to him alone, and though the mules and horses were purchased for the firm and used in the business, and were never paid for, yet Lambeth, the purchasing member of the firm, is alone liable to Vanstory, and the latter cannot look to the firm, because, as is insisted, he did not trust the firm, but took the notes of Lambeth alone. We cannot see the force of this argument, for if Lambeth had paid Vanstory for the stock, instead of giving his notes, he would have been entitled to credit for the amount paid, as was the case and was done with the $100 paid by him on the debt to Vanstory, and, as he was liable for it, he had a right to have it discharged out of the partnership effects, before any division of profits could be had. *Scott* v. *Kenan*, 94 N. C., 296; *Stout* v. *McNeill*, 98 N. C., 1. We think, upon this ground, the ruling of the Court below was correct; but there is another ground upon which the ruling can be sustained.

When one member of a firm buys goods on his own credit, without disclosing the fact that he is a member of the firm, and the goods are received and used by the firm, it would be liable to the vendor for the price of the goods, and in such case, in order to exempt the firm from liability, it would be necessary for it to prove that the vendor knew that the purchasing party was a member of the firm and elected to give credit to him alone. *Poole* v. *Lewis*, 75 N. C., 417.

Upon examination, it will be found that the authority cited by counsel for the plaintiff (Story on Partnerships, § 140, *et seq.*) has reference to cases in which the creditor has knowingly elected to take the separate security of one partner and give exclusive credit to such partner.

For the reasons already stated, and to the end that such judgment may be rendered as will determine the matters in controversy, we dismiss the appeal with the opinion above given.

Dismissed.

W. J. HARDIN v. R. O. LEDBETTER.

Judge's Charge—Contributory Negligence—Streams and Ponds, Rights of Upper and Lower Proprietors.

1. If improper evidence is admitted after objection, but the ill effect which it might have is obviated by the Judge's charge, a new trial will not be ordered in this Court.

2. H. had a mill on a stream, and L. had a mill lower down on the same stream; both had dams across the stream. H. took out his dam, which caused the accumulated mud, &c., in his pond to fill up L.'s pond to such an extent as to back the water to the injury of H. L. was notified by H. to raise his flood-gates, so as to let the

mud pass through when H.'s dam was removed, but L. refused to do so: *Held*, that H. could recover damages from L. caused by the back water, but L. could not recover for damages suffered by the filling up of his pond, because his refusal to open his flood-gates made him guilty of contributory negligence.

3. No instruction, terminating in telling the jury the plaintiff cannot recover, is in form to meet the issues of fact, nor should it be given.

CIVIL ACTION, tried before *MacRae, J.*, at Fall Term, 1887, of RUTHERFORD Superior Court.

There was a verdict and judgment for the plaintiff. The defendant appealed.

The facts are fully stated in the opinion.

Mr. W. P. Bynum, for the plaintiff.
Messrs. Battle & Mordecai, for the defendant.

SMITH, C. J. This, suit begun on April 21, 1885, is prosecuted by the plaintiff, for the recovery of damages sustained in working his water mill upon Holland's Creek, by the ponding of the water back upon his wheel by the defendant, who owns and operates a similar mill below, and on the same stream.

Upon the trial, issues were submitted to the jury, which, with the findings thereon, under the direction of the Court, are as follows:

1. "Is the plaintiff endamaged by the defendant's ponding water back on his water-wheel?" "Yes."

2. "What amount of annual damage is the plaintiff entitled to recover?" "One hundred dollars."

3. "Is the defendant damaged by the wrongful act of the plaintiff, as alleged in the counter-claim, and if so, how much?" "No."

The general facts of the case out of which the controversy grows, may be summarily and sufficiently stated, to render

intelligible the ruling and the exceptions thereto presented in the appeal, without a tedious repetition of the testimony in detail.

The defendant owns and operates a public mill on the creek, below that of the plaintiff, and the complaint is, that his dam ponds the water back upon the water-wheel of the plaintiff, so as largely to interfere with its power and driving capacity. The plaintiff at first used a wheel of 18 feet diameter, which, to obviate in some degree the difficulty, he reduced in size by two feet. He had also constructed two dams, which, for the same purpose, he removed, and tapped the creek at a point higher up, and brought the water thence down to his wheel, an overshot wheel, thereby giving it increased power to do the work. In consequence of the large volume of water descending after the removal of the plaintiff's dams, carrying with it the accumulated mud, sand, and rubbish above, the defendant's pond became filled therewith to a degree that the raised water in defendant's pond interfered, as before, with the working capacity of plaintiff's mill, for the injurious consequences whereof, in the loss of patronage, the present suit is brought.

It appears that there is a waste-gate way on the defendant's dam, which, by opening, would let pass the mud and sand, and was so permitted to be used by a former owner, from whom the defendant obtained the property. The plaintiff demanded that the defendant should allow the opening of this outlet for the accumulated dirt, which was refused, the defendant saying that if he did so he would expose himself to a claim for damages from proprietors below him, and he demanded compensation for the injury to his lands from the mud deposit formed in his pond.

There was much testimony offered upon these controverted matters, and upon the extent of the injury in the value of the plaintiff's property, and from its crippled condition and inability to do its former work.

This brief statement of the case will suffice for a proper understanding of the exceptions taken during the progress of the examination of the witnesses, of the defendant's prayer for instructions, and the instructions under which the jury arrived at their verdict.

The instructions asked are as follows:

1. If the jury shall find that the plaintiff is injured by the ponding back of water on his wheel, and the injury results from the concurring acts of each, and proceeds from his tearing down of his dams, as the immediate and proximate cause of his damage, he is not entitled to recover.

2. That if the jury find that the plaintiff's mill-pond was from one and a half to two miles long, and contained accumulations of mud and sand deposited during twenty-five or more years, and the dams were removed during the limited time mentioned by the witnesses, this would be contributory negligence, and a bar to plaintiff's recovery.

3. That the plaintiff was under legal obligation to use such care and prudence in removing his dams as not to cause the overflow of the banks below; and if done in such manner as to fill up and close the natural channel of the creek, it would be contributory negligence, depriving him of any right of action for resultant injury.

4. That plaintiff is only entitled to the natural flow and fall of the creek for drainage, and if, in tearing down his dam, an unusual discharge of mud and sand was precipitated, from which the damage proceeded, he cannot recover.

5. That defendant, having a right to maintain his own dam, unless he thereby ponded the water, and if no injury would have followed but for plaintiff's removal of his own dam, he cannot recover.

6. That the recovery, if any, should be measured by the toll lost in consequence of plaintiff's inability to earn it, by reason of his being compelled to diminish the size of his water-wheel.

7. That his recovery should be limited to the impairment in value of his mill.

8. That if no such loss occurred, plaintiff has suffered no damage, and there is no evidence of such loss.

The Court, after presenting the contending claims of the parties, each charging the other with causing damage, proceeded to charge as follows:

"Is the plaintiff endamaged by the defendant ponding water back on plaintiff's water-wheel?

"There is no question here about any claimed right of prescription or otherwise, on the part of the defendant, to pond his water as far back as plaintiff's wheel. He says he does not do it, but, if done at all, it is done by plaintiff's own act. To reach the truth and justice of the matter, it is necessary for us to consider what the rights of each party are in the premises. These parties, being upper and lower proprietors of the land on Holland's Creek, are each entitled to make such use of the water, as it passes through his land, as he may choose, and then let it pass on to the use of those below, but he must so use it as not to injure another. The defendant has no right to hold such an amount of water as will pond back upon the plaintiff, and if, by defendant's act, the water is caused to so pond back upon plaintiff's wheel, the plaintiff is damaged thereby; but if the ponding back is caused by the *wrongful* act of the plaintiff himself, he cannot be said to be injured by the defendant; and if the plaintiff's act is wrongful, and concurs with a wrongful act on the part of defendant, and both the acts together produced the injury, it cannot be said to have been done by the defendant. What will amount to a wrongful act on the part of the plaintiff? If he has a mill and keeps up a dam, after his pond is filled the water must be permitted to flow on in its natural and ordinary course—not to withhold from below the usual flow, nor to force upon the lower proprietor a greater flow than usual, as far as this can be done consistently with the carrying on of the ordinary business of his mill.

"There is no law that requires one who has a mill to continue in the business. He may take down his dam, provided he does so in such a gradual way as not to inject at one time a larger body of water, or what the water carries with it in its natural flow, upon the lower proprietor, to his injury. If, however, he takes the proper precaution, and, in taking away his dam, makes the flow so gradual that the lower proprietor can reasonably take care of his own property and avoid injury by opening his flood-gates, or otherwise, his act is not wrongful, and it is the duty of the defendant to take such precautions on his part that he shall not, by keeping his dam closed, or by failure to make any other provisions, permit the sand and mud to accumulate in his pond, and so prevent the usual and ordinary flow of the stream by plaintiff's mill, and pond water back on plaintiff's wheel. And, if plaintiff used the precautions I have described as necessary to be done by him, and if it was by the act or refusal to act of defendant that the water was ponded back, and if you find that it was ponded back on plaintiff's wheel, you will respond to the first issue, 'Yes.'

"If the plaintiff was in fault, and caused the water, sand, mud and trash to be forced upon the defendant's dam, or into his pond, or caused the sand to accumulate near his own mill, when, by proper precaution, he might have avoided this result, he cannot be said to have been injured by the defendant; you should answer, 'No.'

"You have heard the testimony on both sides as to the manner in which the plaintiff's dam was opened, and it is for you to say whether he did use all necessary precaution to avoid injury to his neighbor below. If you say 'Yes' to the first issue, you will consider the next: what amount of annual damage is plaintiff entitled to recover thereby—that is, under the statute, what are his annual damages? What is the average yearly damage? It would not be fair for you to measure his damage by the capacity of his machinery,

before and after the injury; but you must consider, in general, the loss of capacity, the amount of business generally done, the loss of business, if any, by the loss of the capacity to do business occasioned by the injury, and ascertain what would be a fair assessment of each year's damage, from one year before the action up to the time of the trial, on an average yearly loss.

"The action was brought to Spring Term, 1885. So you can, if you find any damages, go back and consider what is the average damage for about three years, which will bring you up to the time of the trial. You are to give damages in gross for all the time; but the yearly damage you may average at so much a year, or you may say how much for 1885, how much for 1886, how much for 1887, up to this date. If, however, you have responded 'No' to the first issue, you will respond to the second issue 'None', and proceed to the third and last issue."

The charge upon the third issue is omitted, as unnecessary for the proper presentation of the case.

Defendant excepted to the failure of the Court to give the instructions asked by him, and to the instructions as given.

The jury responded to the first issue, "Yes." Second issue, "$100." Third issue, "No."

Rule for new trial, &c.

The exceptions to the rulings upon evidence are these:

The plaintiff, among other things, testified that the value of his mill some eight years ago, before the action, and after he had put in a new 18-foot wheel, the same size of the old one, was $4,000 or $5,000, and it is not now more than half what it was at the start; it will not do more than half the grinding.

Defendant objected to the testimony as to the value of the mill, and suggested that the question should be as to the capacity of the mill.

First Exception.—Objection overruled, and defendant excepted.

Plaintiff being asked as to the capacity of his mill before the ponding back, said it would then grind from seventy-five to eighty bushels of grain, and would gin four or five bales of cotton a day.

Second Exception—Defendant objected. Objection overruled. Defendant excepted.

Plaintiff further testified that he had ground about 12,000 bushels of grain, and ginned, on an average, about 75 bales of cotton a year, and that now he did not grind more than 6,000 bushels of grain a year, and gin about 40 bales of cotton, on account of the loss of power.

Objected to by defendant. Overruled, and defendant excepted.

Third Exception.—Plaintiff further testified that he went to see defendant about the water, and told him that it was backing on his (plaintiff's) wheel, and injuring plaintiff, and he would like for defendant to draw his flood-gates and let off his water, and let the mud and saw-dust, &c., which had accumulated in his pond, pass through; that that had been the rule heretofore with plaintiff and Whitesides, the former owner of defendant's mill—that the flood-gates were to be opened and the water drawn off occasionally; that defendant said he could not do anything of that kind; that plaintiff told defendant that he had better cut a race, like plaintiff had done, and run his mill by the race instead of the pond. Defendant said it would cost him $300 or $400, and he could not afford it. Plaintiff told him that he (plaintiff) would cut it for $100, and guarantee that it would not stop his mill two hours; and that unless something was done to relieve him, plaintiff would have to sue. Defendant said that if plaintiff wanted to put it in law, to go ahead—he could stand it if plaintiff could.

To all this conversation with defendant, defendant objected. Objection overruled. Defendant excepted.

Fourth Exception.—Plaintiff further testified that Whitesides, the former owner of the mill now owned by defendant, would raise the flood-gates occasionally to let the water and mud and sand out, and it would relieve plaintiff's wheel.

Defendant objected to the testimony as to what Whitesides did. Objection overruled. Defendant excepted.

Fifth Exception.—Plaintiff further testified that the pond was filling up gradually all the time while Whitesides owned it, but not so rapidly as it had since defendant owned it, on account of the occasional opening of the gates by Whitesides.

Defendant objected; overruled. Plaintiff excepted.

Sixth Exception.—D. O. Hardin, a witness for the plaintiff, testified that when plaintiff repaired the mill and put in a new 18-foot wheel, the capacity of the mill was about seventy-six bushels of grain per day.

Objected to by defendant; overruled. Defendant excepted.

Seventh Exception.—John Hardin testified that the capacity of the plaintiff's mill, before the ponding back upon the wheel, was about seventy-five bushels of grain per day.

Objected to by defendant; overruled. Defendant excepted.

Eighth Exception.—David Houser testified for plaintiff that there was considerable difference in power with the 16-foot wheel instead of the 18-foot wheel. Witness never saw the 18-foot wheel tried, but the change to the 16-foot wheel would injure the value of the mill.

Ninth Exception.—Defendant objected; overruled. Defendant excepted.

The objection to the testimony embraced in the two first exceptions, if possessed of force, is obviated by the rule for assessing damages laid down by the Court, and, as relating to the extent of the capacity of the mill and its operations, in connection with their impairment for want of water-power, the testimony was pertinent and proper, and, at

least, rendered so, in the effect given to it by the Judge in his charge to the jury.

Without specifying the other exceptions to the testimony admitted, a single general answer will dispose of them all. The testimony shows that Whitesides, a former proprietor, would, when owner, raise the flood-gates occasionally and let the mud pass out of his pond with the water, and thus relieve the plaintiff's wheel, and this was communicated to defendant, with a request that he should do the same; that the pond was now filling up faster than before, because of the shutting down of the waste-water gates. The other evidence objected to was of the kind mentioned in the first two exceptions. In our opinion the evidence all bore upon the subject-matter of controversy, and was competent.

We think the law was correctly laid down by the Court in the charge to the jury, and fully meets all the just demands of appellant.

The facts were few and simple. The plaintiff had an undoubted right to make the improvement, by taking the water of the creek at a higher point, and, in order thereto, to take away his own dams. The damage from the descended mud and water arose from the stoppage by the defendant, and this could have been avoided by the opening of his flood-gates. His refusal to do this was the cause of the back flow, and he was, consequently, alone in fault. It was not a case of concurring negligence, but the negligence, if of any one, of the defendant alone. The principle underlying and regulating the relations of adjoining owners of water-power, on the same stream, is very concisely and briefly set out in the directions given the jury, and is embraced in the Latin sentence, *Sic utere two ut alienum non lædas.*

The defendant, if he could do so, without self-injury, should not needlessly have obstructed the passing of the mud and sand, that entered his own pond, out of it into the current below. We see no error, and affirm the judg-

ment. We have noticed only the case made out by the Judge, but we repeat the remark, so often made, that no instruction terminating in telling the jury the plaintiff cannot recover, is in form to meet the issues of fact, nor should be given.

No error. Affirmed.

J. W. McLAUGHLIN et al. v. THE HOPE MANUFACTURING COMPANY.

Injunction— Water-Courses; Individual and Public Rights in— The Code, ch. 56, vol. 2.

1. The classification of water-courses, and the respective rights of individuals and the public therein, as defined in *State* v. *Glen*, 7 Jones, 321, is approved.
2. A stream which has not been used for navigation by boats, but only for rafting timber, turpentine, &c., *down* the stream, comes within the third class, as defined in *State* v. *Glen*.
3. Authority over streams, conferred upon County Commissioners by ch. 56, vol. 2, *The Code*, while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream, when he is proceeding under the permit and direction of the Commissioners.

This is an APPEAL from a judgment of *Shepherd, J.*, rendered on the 11th day of December, 1888, dissolving the restraining order theretofore granted, and refusing the motion to continue the injunction, said motion having been heard, by consent, at Rockingham, RICHMOND County.

The facts are stated in the opinion.

Mr. Thomas H. Sutton, for the plaintiffs.

Mr. W. A. Guthrie, for the defendant.

Davis, J. It is alleged that the defendant is an incorporated company, engaged in the manufacture of warps, yarns, plaids, etc., in the county of Cumberland, and that said company has commenced the erection of a large factory on the waters of Rockfish Creek, in said county; that the plaintiff and other citizens of Cumberland County have, for a great many years, used the waters of said creek for the purpose of transporting produce, such as rosin, timber, turpentine, etc., to market; that for many years the stream was "regularly worked by overseers duly appointed to clear the same of obstructions," and that it was made "a navigable stream by public enactment of the General Assembly of North Carolina," and, by long-continued and uninterrupted use by the public, the public have acquired the privilege and paramount right to the free and uninterrupted use of its waters, as a navigable stream, for the transportation of produce. It is further alleged, that the defendant company is erecting a dam across said stream, claiming that it has the right so to do, upon "the erection of slopes, slips or locks of the dimensions of 12 x 30 feet," which are totally inadequate for the purpose of transportation; that the construction of said dam and locks will obstruct the navigation "of said waters, and deprive the plaintiff and all other citizens of their long use and right of navigation of said stream, and the same, if allowed by the courts, or persisted in by the defendant, will be a nuisance to the public and people who have a right to the navigation of said waters, and work irreparable damage to the plaintiff and all others interested"; that the plaintiff had no notice of the intention of the defendant to build the dam so as to obstruct the navigation of said creek until after the same had been commenced, and made known to the defendant his complaint as soon as he heard of it.

The plaintiff asks that the defendant be enjoined, etc.

The action was commenced November 20, 1888.

By chapter 197, Acts of 1848–'49, the Courts of Pleas and Quarter Sessions of the counties of Robeson and Cumberland are authorized to appoint overseers, with an allotment of hands, "to clear out and render navigable Big Rockfish Creek, in said counties." By section *three* of this act, it is made unlawful and indictable to obstruct the free navigation of said creek, and section *four* provides that all owners of dams across said stream "shall cause to be constructed, and kept open and in good repair, good and sufficient slopes for the free passage of all rafts of lumber, timber, turpentine and other products."

The plaintiff offered the record of the County Court of Robeson County, January Term, 1845, showing the appointment of overseers of Rockfish Creek, and affidavits tending to show that it was under the charge of overseers in the county of Robeson down to the beginning of the late war; that no work has been done by authority of law since the beginning of the war.

The plaintiff also offered numerous affidavits tending to show that Rockfish Creek has been used by the public for many years—as many as forty, fifty and fifty-five years, within the knowledge of witnesses, and by reputation as many as one hundred years; and some of the affidavits tend to show that the lock erected at the dam of defendant is not sufficiently long to permit the shipment of rosin, tar, etc., without serious loss to shippers.

The defendant company answers, at great length, and sets out the circumstances under which the dam in question was erected.

The defendant filed, as appears from the record, a petition to the Board of Commissioners of Cumberland County, on the first Monday in February, 1888, as follows:

"The petition of the Hope Mills Manufacturing Company respectfully represents that it is desirous of erecting a dam across Big Rockfish Creek, in the county of Cumberland, on

the lands of the petitioner, adjoining the lands of J. W. Emmett and others, for the purpose of erecting the necessary buildings and machinery for a cotton factory.

"That your petitioner is informed and believes that for many years last past said Big Rockfish Creek has not had overseers appointed nor hands assigned to work the same, under the provisions of chapter 56, vol. 2, *The Code* of North Carolina, and said creek has not for a long time been treated as a stream within the provisions of said chapter.

"But as your petitioner proposes to expend large sums of money in the erection of said dam and buildings and machinery, before doing so, and out of abundant caution, your petitioner desires an expression of the sense of your honorable Board, as to the object contemplated, and whether or not the erection of the proposed dam across said Big Rockfish Creek meets with your approval.

"That your petitioner requests, in case the erection of said dam shall meet with your approval, that your body shall appoint a committee, under the provisions of sections 3710, 3712, 3713 and 3714 of ch. 56, vol. 2, *The Code*, aforesaid, clothed with the duty of determining whether any gates or slopes in said dam are necessary, and, if so, the plan, dimensions and construction of the same, to the end that your petitioner may be apprised beforehand as to what will be required, and that all provisions of law in that behalf may be observed by your petitioner, and all controversy relating to the same obviated in the outset."

That the petition of said corporation was granted by the unanimous vote of the Board of Commissioners, and the following resolutions unanimously adopted, viz.:

"*Resolved*, that the erection of a dam across Big Rockfish by the Hope Mills Manufacturing Company, on the lands of said company, adjoining the lands of J. W. Emmett and others, meets with the approval of this Board.

"*Resolved*, that A. B. Williams, Jas. D. McNeill and John Blue be appointed commissioners to ascertain whether or not gates and slopes are necessary in said dam, and, if so, the plan and dimensions of the same, giving hereby to said commissioners all legal authority and power relating to the same provided in chapter 56, vol. 2, of *The Code*."

It appears that when the petition was filed and acted upon, many people from different parts of the county were in the commissioners' office, and in and about the court-house; that Wm. Aldeman, a resident near Big Rockfish Creek, discussed the subject-matter of the petition, in behalf of turpentine and timber men, who used said stream for rafting, etc., and, at his suggestion, one of the commissioners was appointed by the board, on account of his residence in that part of the county, to represent them. It further appears that the action of the Board of Commissioners was published in the *Fayetteville Observer*, a newspaper of considerable circulation, and to which, as appears from the affidavit of its writer, the plaintiff was a subscriber, and that the commissioners appointed to ascertain what was necessary in regard to gates or slopes, pursuant to previous notice, met at the place where it was proposed to erect the dam, at which meeting persons representing the timber and rosin interest were present, and a plan for the construction of the dam was agreed on by the commissioners appointed by the Board, and reported to the Board of Commissioners at their meeting on the 5th of March, 1888, and unanimously adopted, and soon thereafter the defendant company commenced the erection of the dam, in accordance with the plan reported, and had expended a large sum of money; and on the 9th day of October, after the expenditure, as the defendant alleges, of at least $75,000, a petition to the Board of County Commissioners was filed praying "for relief in regard to the obstruction of Rockfish Creek," by defendant's dam.

The Board of Commissioners, against the protest of the defendant, and after hearing both sides, granted the petition, and resolved that "the case be re-opened for the purpose of securing full information in regard to the locks and dams proposed to be put in said stream."

Thereupon, a resolution was adopted, to the effect that the committee again visit "the grounds, after full notice to the citizens interested, of the time, * * * and report to the Board, at its next meeting, what action should be taken in regard to said obstruction."

This committee made a report, in which, after setting forth that, after giving notice, they met at the mill of defendant, and, after stating that "several parties interested in the navigation of Big Rockfish, who were not at the previous meeting, were present this time," and giving the contention of each side, they concluded as follows:

"At the first meeting of your committee, to take action upon the application to dam the stream, the present size, 12x30 feet, was unanimously agreed upon by all present, and we, therefore, having made that report to you, and it having been acted upon and accepted, do not feel that we have any right or power to make any change, and, therefore, ask to be discharged from any further service in this matter."

The evidence, in the shape of affidavits, is voluminous, and the plaintiff, by affidavit, alleges that the delay in bringing action was, in substance, because of the frequent and repeated promise of the defendant company, by its agent, "that they would endeavor to make the required changes," and, relying on these assurances, and believing that there would be a satisfactory adjustment, suit was delayed, and only resorted to when all other means had failed.

In *State* v. *Glen*, 7 Jones, 321, BATTLE, Judge, after a very full review of the authorities upon the subject, gives the following as a summary of the law of North Carolina in relation to the water-courses of the State:

"1. All the bays and inlets on our coast, where the tide from the sea ebbs and flows, and all other waters, whether sounds, rivers or creeks, which can be navigated by sea vessels, are called navigable, in a technical sense, are altogether *publici juris*, and the soil under them cannot be entered and a grant taken for it, under the entry law. In them, too, the right of fishing is free. See *Collins* v. *Benbury*, and the other cases to which we have referrred on this point.

"When the tide ebbs and flows the shore between the high and low water is also within the prohibition of private appropriation, under the general entry law, but may be the subject of a direct special legislative grant. *Ward* v. *Willis*, 6 Jones' Rep., 183.

"2. All the rivers, creeks and other water-courses, not embraced in the above description, but which are in fact sufficiently wide and deep to be navigable by boats, flats and rafts, are technically styled navigable, and are open to be appropriated by individuals, by grants from the State, under the entry laws. When the bed of the water-course is not included in the grant, but the stream is called for as one of the boundaries, the grantee is entitled, as an incidental easement, to go to the middle of the stream, and may exercise and enjoy that easement for the purpose of catching fish, or in any other manner not incompatible with the right which the public have in the stream for water communication between different points on it. The mode and the extent of the enjoyment of this easement may be regulated by statute, and as the riparian proprietors paid nothing into the public treasury for it, the soil which composes the bed of the river may be granted to others, and the Legislature may, perhaps, reserve the incidental rights for the public use, without making compensation for them, though we believe it has often given such compensation. See *Smith* v. *Ingram*, 7 Ired., 175, and the various charters granted to companies for improving the navigation of nearly all our largest rivers.

"3. All the rivulets, brooks and other streams, which, from any cause, cannot be used for intercommunication, by inland navigation, are entirely the subjects of private ownership, are generally included in the grants of the soil, and the owners may make what use of them they think proper, whether it be for fishing, milling or for other lawful trade or business. The only restriction upon this right of ownership arises, *ex necessitate*, from the nature of running water, and it is that the owner shall so use the water as not to interfere with the similar rights of other proprietors above or below him on the same stream. See *Pugh* v. *Wheeler*, 2 D. &. B., 50.

"Rights acquired in streams of this class by grants from the State, or in water-courses of the second class, by grants from the State for the bed of the stream, cannot be taken from the owners by the government, except in the exercise of the power of *eminent domain*, and then only for public use, with a provision for the just compensation. See *Raleigh and Gaston Railroad Company* v. *Davis*, 2 D. & B., 451."

Rockfish Creek has not been used for navigation by boats, but only for rafting timber, turpentine, etc., *down* the stream, and it would seem to come within the third class of Judge BATTLE'S summary. But it is insisted by the plaintiff that, however this may be, by long and uninterrupted use, and by legislative enactment, the public has become entitled to its use as a highway for the transportation to market of their timber, turpentine and other products, and it is denied that the County Commissioners can authorize its obstruction.

What is a good and sufficient passway for rafts must be a question for the determination of some authority, and in the case of Rockfish Creek, prior to the adoption of the present system, this authority, under the supervision of the county courts of Cumberland and Robeson counties, was vested in overseers, whose duties were to remove all obstruc-

tions, and see that those who erected dams for mills provided good and sufficient slopes.

The authority over all such streams is now vested in the Board of County Commissioners of the several counties through which the streams may flow, to be exercised in the manner prescribed by chapter 56 of *The Code*, and the defendant company applied for, and, it appears, erected its dam under the authority conferred by that chapter.

What action was taken by the Board of Commissioners upon the last report of the committee does not appear, and whether they had the power, after the defendant had expended money in the erection of the dam and lock, under the authority conferred, to revoke the authority and require the defendant to change the passage way for rafts or remove its dam without compensation, is not a question for our consideration. The authority of the Board of County Commissioners, while it stands, and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy sought by the plaintiff in this action.

No special damage is alleged, and whether, if the dam be "a nuisance to the public," the action could be maintained by the plaintiff, as insisted by his counsel and denied by the defendant, it is not necessary for us to determine. There is no analogy between this case and that of the *State* v. *Narrows Island Club*, 100 N. C., 477.

The subject is fully discussed by Wood in "Law of Nuisances," in the chapter on Navigable Streams, section 575, *et seq.* He concludes that in this country there are three classes of navigable streams:

1. Tidal streams that are navigable in law.

2. Those that, although non-tidal, are yet navigable *in fact* for "boats or lighters," and susceptible of valuable use for commercial purposes.

3. Those which are *floatable*, or capable of valuable use in bearing the products of the mines, forest and tillage of the country it traverses to mills or markets.

The extent to which the riparian owner may go in the erection of dams, etc., to apply the use of the water to the propulsion of machinery, and the extent to which the State may authorize obstructions, present interesting questions, the consideration of which is not necessary for the determination of the case before us.

No error. Affirmed.

DURANT WOODARD et al. v. DAVID BLUE et al.

Descents—Marriage—Act of 1879, *The Code*, § 1281, *Rule* 13.

1. The act of 1879, *The Code*, § 1281, Rule 13, is a valid law as to *descents* after its passage, and renders legitimate the children of *all* colored parents living together as man and wife, born before January 1, 1868—even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth.

2. But in such cases, during slavery times, when lawful marriage between certain colored persons could not exist, though the fact of cohabiting furnishes presumptive evidence that a child is the issue of the persons thus living together, the fact is open to disproof by any evidence sufficient to overcome the presumption. The same stringent rules as to proof do not prevail as in cases of established legal marriage, where impotency, non-access and the like must be proved to rebut the presumption of legitimacy.

3. Where the mother of the person claiming to be heir of the decedent, who was a slave at the time of the birth, had testified that she and decedent had been married and cohabited as husband and wife, it was competent to show by another witness that she had often declared that the claimant was not decedent's but another named person's child, at least to *impeach* her credit: and there being opposing testimony as to cohabitation about the time of the birth, it was material as to that essential matter.

WOODARD *v.* BLUE.

CIVIL ACTION, for the recovery of land, tried before *Armfield, J.*, at Spring Term, 1889, of the Superior Court of BURKE County.

The plaintiff Emily, wife of the plaintiff Durant Woodard, claiming to be the daughter and sole heir-at-law of Underzine Pelott, and the other plaintiff, Mourning Crisp, claiming to be his surviving widow, sue the defendants, who are in possession of the several tracts of land mentioned and described in the complaint, to establish their title to and to recover the same, with damages for the withholding.

The defendants admit that the intestate owned said lands at the time of his death, and their holding under Tom Walton and certain others named, to whom, as his rightful heirs, descended all the said tracts except that described as No. 2, as to which certain equities are set up in behalf of said Tom Walton, growing out of his furnishing a part of the purchase money therefor, and the intestate's agreement, as alleged, to have the title conveyed to them jointly.

Thereupon, issues were made up and submitted to the jury, which, with their respective responses, are as follows:

1. "Is the plaintiff Mourning Crisp the widow of Underzine Pelott, and entitled to dower in the lands in controversy?" Answer, "No."

2. "Is the plaintiff Emily Woodard, wife of Durant Woodard, the only heir-at-law of the said Underzine Pelott?" Answer, "Yes."

3. "Is the said Mourning Crisp, as widow of Underzine Pelott, and Emily Woodard, as his only heir-at-law, entitled to the possession of the land described in the complaint?" Answer, "Not Mourning Crisp, but Emily Woodard, is."

The said Mourning, examined at the trial on behalf of the plaintiffs, testified to her marriage with the deceased, before a Justice of the Peace, about ten years before the war, he then being a slave and herself the offspring of a white mother; their cohabitation, as husband and wife, for a period

during which their children were born, of whom one was the plaintiff Emily, and its discontinuance since the termination of the war, though the said Underzine lived until a year or two before the institution of this suit, when he died.

During the cross-examination, the defendants put this question to the witness:

"Have you not repeatedly told Tom Walton, a slave, brother of Underzine, belonging, with him, to the same owner, and living in the same family at the time when Emily was born, that Emily was not Underzine's child?"

On objection of plaintiffs, the inquiry was disallowed, except to impeach the witness, and defendants excepted.

The defendants insisted that the marriage, being between a white woman and a slave, was void in law, and that such intermarriage between a free person of color and a slave is expressly forbidden by the statute (Rev. Stats., ch. 111, § 77); nor is it protected by the amendatory act of January 9, 1845 (Acts 1844–'45, ch. 85), which allows such intermarriage when entered into with the owner's consent, previous to the passing of the act.

The Court expressing an opinion that the act of 1879 covered the present case, and has the effect of rendering all children born in slavery, where the parties were living as man and wife, capable of inheriting, but reserving a decision upon the point, the defendants proceeded to call their witnesses and develop their testimony.

Tom Walton, being sworn, testified as follows: Underzine and Mourning were regarded as man and wife when they went to Tennessee, to the farm whereon witness worked with them, and where they remained four or five years, during which time Emily was born. Mourning stayed sometimes at the house where Underzine stayed, and sometimes at the big house, he being a field hand and she a house servant; they did not live as man and wife while there.

Defendant offered to prove a general reputation in the family that the *feme* plaintiff was not Underzine's child, but that another person was her father. The evidence was held to be incompetent if the parties were then cohabiting, and to this ruling the defendants excepted.

Defendants then proposed to show that Underzine and Mourning each had repeatedly declared that the former was not the father of said Emily, and that, though living in the same family, there had been no actual sexual connection of which she could be the fruit, and her actual father was the man with whom they lived, and who had been the owner of Underzine while a slave; that the parties left Tennessee after the close of the war, and settled in Burke County, living about eight miles apart, where they remained until his death, he, meanwhile, having no connection whatever with Mourning and her daughter, and, from his emancipation, at all times repudiating and disowning any relation to either.

The Court, ruling the offered evidence irrelevant and incompetent, stated that the jury would be directed to find upon the issues: in response to the first, "No"; to the second, "Yes"; to the third, "No," as to Mourning; "Yes" as to Emily and Durant, "if the parties were married and were living together and cohabiting as man and wife when the plaintiff Emily was begotten and born."

In deference to this intimation, defendants' counsel said they could not resist a verdict, and it was rendered accordingly, and from the judgment they appealed.

Messrs. S. J. Ervin and *I. T. Avery*, for the plaintiffs.
Messrs. J. T. Perkins and *F. A. Sondley*, for the defendants.

SMITH, C. J. (after stating the case). At the time when the alleged marriage was contracted, Underzine was a negro slave, and Mourning the daughter of a white woman, and if not herself white, necessarily of mixed blood, and, whether

one or the other, equally disabled, by positive law, to enter into a contract of marriage with a slave.

By an act passed in 1741, it is declared that if any white man or woman, being free, shall intermarry with an Indian, negro, mustee or mulatto man or woman, or any person of mixed blood, to the third generation, bond or free, such person shall forfeit and pay, to the use of the county, one hundred dollars, and a penalty is imposed upon any minister or Justice of the Peace who knowingly shall presume to marry such. Rev. Stat., ch. 71, § 56.

The act of 1838 declares all marriages entered into since January 8, 1839, or thereafter entered into, "between a white person and a free negro, or free person of color, to the third generation, shall be void." Rev. Code, ch. 68, § 7.

This latter enactment does not extend as far as that which prohibits and annexes a penalty to the act of intermarrying of a white with a person of color, whether bond or free, but confines its operative force to annulling of marriage attempted between a white person and a free negro or free person of color. The restraint thus limited became inapplicable to the case of a white person marrying a slave, because there was in the latter an incapacity, arising from the *status* of the slave, to make such contract, and it was, *ipso facto*, without any statute making it so, void. In like manner the intermarriage of a free negro and slave was prohibited by the act of 1830 (Rev. Stat., ch. 111, § 87), an offence for which the free person of color was subjected to indictment, unless the same was with the consent of the owner of the slave, under the amendment of 1844 (Rev. Code, ch. 107, § 61), given to a marriage which took place previous to November 1, 1844.

This legislation continued in force during the existence of slavery, no marriage being recognized as binding when had between slaves, and inhibited by positive law when had

between white and free persons of color, who are within the specified degrees, and between the latter and slaves, and this in pursuance of a general public policy growing out of the slavery of a part of the population owned by masters. It still prevails, and inhibits the intermarriage of white and free persons of color into which the slave population had been immerged. *The Code*, § 1810. This interdict is still in force, and held not to be repugnant to the Constitution of the United States, or legislation under it, in *State* v. *Hairston*, 63 N. C., 451, though the relation, if *legally created* elsewhere, is recognized as a valid subsisting relation, when the parties come into this State from that of their former residence. *State* v. *Ross*, 76 N. C., 242. But its validity is not recognized when parties, having their domicile here, to evade our laws, go to a State which allows such marriage, with intent to return and keep up their domicile. *State* v. *Kennedy, ibid.*, 251.

As no provision was made by law giving sanction to the marriage relation formed between slaves, while there was no absolute restriction put upon free persons of color, and they could intermarry one with another, while they could not with white persons or slaves, it became necessary to provide by law for the legalizing of marriages between slaves who could not enter into any marriage contract, and the General Assembly passed the act of March 10, 1866.

The fifth section, which alone bears upon the present inquiry, legalizes a cohabitation among those who were lately slaves, when still continued, and validates the relation as a marriage from its commencement; and, to give the act full force, directs the parties to go before the Clerk or a Justice in acknowledgment of assent, and to state the time when it began. This enactment has been considered at the present term, in *Branch* v. *Walker*, and obviously imparts no sanction to the cohabitation alleged in the present case.

The act of February, 1879, adds to the canons of descent, and is in these words:

"The children of colored parents, born at any time before the 1st day of January, 1868, of persons living together as husband and wife, are hereby declared legitimate children of such parents, or either one of them, with all the rights of heirs-at law and next of kin, with respect to the estate or estates of such parents, or either one of them."

The interpretation put upon the broad and comprehensive terms of the statute, as embracing the issue of all colored persons while living as husband and wife, as well when forbidden as permitted by law, determines the ruling of the Judge in support of the claim of the plaintiff Emily as heir-at-law of the intestate Underzine to the lands left by him.

In general words, literally understood, the act does include the children *of all colored parents*, as well those who were always free as those who were formerly slaves (for they all now belong to one and the same class), and its legal effect would be to bestow an inheriting capacity upon all whose parents were thus cohabiting, irrespective of the lawfulness of the relation, and thus sustain the ruling of the Court in applying its remedial provisions to the case before us. It admits of serious doubt whether the statute, in seeking to remove an anomalous condition of the colored race, growing out of the emancipation of the slave population, intended to ignore the unlawful sexual intercourse, so habitually maintained as to assume the form of marriage, and become a cohabitation among the free colored race, to whose lawful intermarriage no impediment not common to all was interposed, and thus place the offspring of a forbidden upon an equal footing with the offspring of a lawful union, in giving the right of succession to an intestate father's estate. The special purpose of the legislation seems to have been to provide against the evil of the universal illegitimacy of slave children, consequent upon the absence of any authority for

their parents, during their servitude, to enter into lawful matrimonial relations; and this is developed in the early enactment of 1866.

But the act of 1879, in unrestricted words, bestows a right to succeed to a deceased parent's estate, not disposed of by will, upon "*the children of colored persons*," born before January, 1868, without exception or qualification, and we do not see how, by construction, any words restricting its operation can be interpolated.

Its efficacy, however, depends upon two essential conditions—a cohabitation subsisting at the birth of the child, and the paternity of the party from whom the property claimed is derived. The cohabiting does not alone confer legitimacy, though it furnishes presumptive evidence that the child is the issue of the persons thus living and indicating their relations; but the presumed fact is open to disproof, and to be determined, as are other facts, upon the force of the evidence adduced, which may be sufficient to overcome the presumption.

To repel the inference of paternity, drawn from the mere fact of cohabitation, the same stringent rules do not prevail as in cases of established legal marriage, when, to bastardize the issue, there must be full, affirmative, repelling proof, such as impotency, non-access and the like, or the presumption of legitimacy will stand. 1 Green. Ev., § 28; Abbott's Trial Ev., 88.

The question of the real, as distinct from the inferred, paternity of the plaintiff Emily, involves a fact as essential to the support of her claim as cohabitation itself, and while the one may be deduced from the other, nothing else appearing, is susceptible of disproof, and, when any has been offered, must be left to the jury to pass upon.

In the trial, Mourning, the mother, swore that, during the cohabitation, the plaintiff Emily and two other children were born (in what order of time is not stated), and that

Underzine and herself "had never lived together since the war, that is, from 1865, up to his death, a year or so before the issuing of the summons in June, 1888, a period of more than twenty years."

The defendants' opposing evidence, that the parties, though upon the same farm, "did not live as man and wife" when Emily was born, and all the evidence, concurs in showing that the relation ceased after their return to the State. Here there was conflicting evidence of the existence of the cohabitation, previously kept up, after the removal to Tennessee, and the time of its discontinuance, whether before or after the birth of Emily, left in doubt upon the testimony.

Again, the defendants were not allowed to introduce evidence of the declarations often made, as well by Underzine as by Mourning, that he *was not*, while his master, in whose house Mourning served as a domestic, was, the father of Emily, and that such was the general reputation in the family. The proposed testimony was declared to be incompetent, if the cohabiting then subsisted; thus, as we understand the ruling, holding the *quantum* and quality of the evidence sufficient to warrant the finding the same as that required to prove illegitimacy of a child born in lawful wedlock.

It does not appear that this testimony was admitted for any purpose, not even in contradiction of the testimony of Mourning, and to impair her credit, as was ruled when her declarations were called for upon her cross-examination. It may be that the declarations were not allowed as original evidence of the fact declared, in which ruling we cannot say there was error, but as the case is careful to state that a similar declaration, sought to be brought out from the mother when under examination, was held admissible to impeach her credit, and admits the qualification in passing upon the proof by other witnesses of similar declarations, we are not

at liberty to annex a similar qualification to the ruling upon the evidence last offered.

The rejected evidence was certainly competent as to the credit of the mother, and material, too, because her testimony is in direct conflict with that of Tom Walton, upon the essential matter of the continuance of the cohabitation in Tennessee.

This view is forcibly suggested by the course of defendants' counsel in making no resistance to the verdict, after the intimation of the opinion of the Court, when there had been developed so much opposing testimony to the fact upon which the legitimacy given by the statute depends.

For these reasons, we think the case was not fairly before the jury, with such directions as to the proofs as were needed to guide them to a correct verdict, and it must be set aside, and a new trial granted

We do not see any want of authority in the General Assembly to pass the act of 1879, which is but a change in the law of descent, and operative in the future only.

Error. *Venire de novo.*

J. B. HOLMAN, Trustee, v. J. S. MILLER.

Judgment, Docketing and Lien of—The Code, §§ 433–83.

1. A judgment is not a lien upon land, in the absence of the actual levy of an execution, until it is docketed in the county where the land is situate, in the manner prescribed by § 433 of *The Code*, and upon the docket required to be kept by § 83 of *The Code*.

2. It is the duty of a judgment creditor to see that his judgment is properly docketed. If the Clerk neglects to docket the judgment, subsequent incumbrances and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the Clerk for loss suffered by reason of the failure to docket the judgment.

HOLMAN *v.* MILLER.

This was a CIVIL ACTION, tried, upon complaint, answer and demurrer to the answer, before *Philips, J.*, at the February Term, 1889, of IREDELL Superior Court.

The facts are, that the plaintiff, as trustee, under a deed in trust, executed by Charles L. Summers and registered in Iredell County on the 4th of November, 1886, sold, for cash, certain lands, and that the defendant became the purchaser in the sum of six hundred and ten dollars. The plaintiff tendered a deed and demanded the purchase money, and, upon defendant's refusal to pay, brought this action to enforce the payment thereof. The defendant contends that the plaintiff cannot make a good title because of the existence of a prior lien upon the land by virtue of a judgment rendered at August Term, 1886, of the Superior Court of said county of Iredell. At the said term a judgment was rendered against the said Summers and others for six thousand dollars, which greatly exceeds the actual value of the land. The said judgment was not docketed until the 21st of May, 1888. It does not appear that there was ever any execution or levy. His Honor held that the plaintiff was entitled to recover, and the defendant appealed.

Mr. D. M. Furches, for the plaintiff.
Messrs. Chas. Armfield and *W. D. Turner*, for the defendant.

SHEPHERD, J. (after stating the case). The question presented for our consideration is, whether an undocketed judgment prevails over a registered deed in trust to secure creditors. Under the law as it existed prior to the adoption of the Code of Civil Procedure, there was no provision for the docketing of judgments, and a lien upon the property of the debtor was acquired only by issuing a writ of *fieri facias*, which bound the property of the debtor from its *teste*. Under the present system no lien is acquired upon land in the absence of an execution and levy, until the judgment has

been "docketed on the judgment docket." *The Code*, § 435; *Sawyer* v. *Sawyer*, 93 N. C., 321; *Williams* v. *Weaver*, 94 N. C., 134. *The Code*, § 433, provides that judgments "shall be entered by the Clerk of said Superior Court, on the judgment docket of said Court. The entry shall contain the names of the parties and the relief granted, date of judgment and date of docketing, and the Clerk shall keep a cross index of the whole, with the dates and numbers thereof. All judgments rendered in any county by the Superior Court thereof, during a term of the Court, and docketed during the same term, or within ten days thereafter, shall be held and deemed to have been rendered and docketed on the first day of said term." *The Code*, § 83, requires a separate and distinct docket for this purpose. So it is very clear, that unless the judgment is docketed upon this particular docket, there can be no lien by virtue of the judgment alone. The docketing is required, in order that third persons may have notice of the existence of the judgment lien. "The dogget, or, as it is commonly called, the docket or docquet, is an index to the judgment, invented by the courts for their own ease and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The practice of docketing judgments seems to have obtained as early as the reign of Henry the Eighth. * * * Purchasers are not bound to examine for judgment liens further than to look into the proper dockets." Freeman on Judgments, § 343. The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, whenever the system of docketing obtains, a very *strict* compliance with its provisions in every respect is required. In *Brandlery* v. *Plummer*, L. I. 26, vol. 326, the mere omission to insert the "number roll of the entry" was held by the Lord Justice to be fatal. In Ridgway & Co's. Appeal, 15 Penn., 177, the failure to record the *christian* names of the defendants invalidated the docketing of the judgment as to

subsequent purchasers or judgment creditors. In *Buchan* v. *Sumner*, 2 Barb., ch. 165, it was held, "that the docketing of a judgment against Palmer Sumner, under the letter P, the initial letter of his christian name, instead of the letter S, the initial letter of his surname, was not even a compliance with the requirements of the statute." In *London* v. *Ferguson*, 3 Russ. Chan. Rep., 349, the judgments had been carried into the proper office to be docketed, but, from mistake of the officer, the dockets were not completed. Lord Gifford "decided that the holders of the judgments were not, even in equity, entitled to a priority." In our case no attempt whatever appears to have been made to have the judgment docketed, and although it was the duty of the Clerk to have done so, his omission is no excuse for the judgment creditor, as the authorities all clearly establish that it was his duty "to see that his judgment is rightly entered on the judgment docket. * * * The remedy of the party aggrieved is against the prothonotary (or Clerk). * * * The purchaser is not bound to look beyond the judgment docket." Ridgway & Co's. Appeal, *supra;* Freeman on Judgments, *supra.*

Holding, as we do, that the judgment is not a lien upon the property, as against this defendant, it is unnecessary for us to consider whether such a defence, had it been valid, could have been asserted by a purchaser at a sale like this, especially where the record is silent as to what was proclaimed as terms and conditions of the sale by the trustee.

We are of the opinion that the plaintiff is entitled to recover.

No error. Affirmed.

J. G. WARLICK v. SARAH LOWMAN.

Cart-ways—Apt Time—The Code, § 2056.

1. Section 2056 of *The Code* is in derogation of the rights of land-owners, and must be strictly construed.
2. A petition for a cart way was filed before the Board of Supervisors, the prayer of the petition was granted, and respondent appealed to the Commissioners and thence to the Superior Court. After the jury was impaneled to try the issues raised between the petitioner and respondent, a motion was made for the first time to dismiss the petition for the want of proper allegations: *Held*, that the motion was not made in apt time, and it was error to grant it.
3. A cart-way will not be granted, under *The Code*, § 2056, as a mere matter of convenience, but only when it is necessary, reasonable and just that the petitioner should have it.
4. The form of the petition, and proper methods of procedure, under *The Code*, § 2056, pointed out.

PETITION for a cart-way, tried, on appeal, before *Armfield, J.*, at Spring Term, 1889, of BURKE Superior Court.

The plaintiff filed before the proper "Board of Supervisors of Public Roads" his petition for a *cart-way*, whereof the following is a copy:

"*To the Board of Supervisors of Public Roads, &c.:*

"The undersigned respectfully petitions to said Board for the granting of a public cart way, leading from his dwelling and lands, and through the lands of Sarah Lowman, into the public highway leading from the Newton road to Rutherford College, for the reasons herein set forth: that your petitioner desires said cart-way as a way to the nearest public mill where he can get grain ground, and, also, said way is his only way to his nearest church and public worship, Sunday-school and burying-ground, said way or route being the only practical way that the petitioner can travel to either of the

above-named places by wagon, buggy or cart; and, furthermore, said petitioner desires said cart-way to haul logs over to his nearest saw-mill where he can get sawing done; and, further, petitioner carries on and is engaged in the business of blacksmithing, and the above-named cart-way is greatly desired as a way for the public to pass and repass to his shops. Petitioner respectfully asks that you carefully consider the complaint set forth in this petition, and then grant the relief hereby demanded."

This petition was heard, and the prayer thereof allowed by the Board, and the respondent, having made objections, appealed to the Board of Commissioners of the county, and they also allowed the prayer of the petition, from which the respondent appealed to the Superior Court. In that Court a jury was impaneled to try the issues of fact raised by the respondent's objections to the petition. Pending the trial, and before evidence was produced, upon objection made by the respondent's counsel, the Court held:

"1. That the petition was insufficient to entitle the plaintiff to the relief he seeks.

"2. That the facts alleged in said petition are not sufficient to give the Court jurisdiction to grant any relief, and that, as the Supervisors had no jurisdiction, this Court could have none on appeal"; and at once directed a juror to be withdrawn, and a new trial, and thereupon dismissed the petition.

The plaintiff, having excepted, appealed to this Court.

Messrs. S. J. Erwin and *J. S. Perkins*, for the plaintiff.
Mr. J. T. Avery, for the defendant.

MERRIMON, J. (after stating the facts). The statute (*The Code*, § 2056) provides that, "if any person be settled upon or cultivating any land, to which there is leading no public

road, and it shall appear necessary, reasonable and just that such person should have a private way to a public road over the lands of other persons, he may file his petition before the Board of Supervisors of the township, praying for a cart-way to be kept open across such other persons' lands, leading to some public road, ferry, bridge or public landing, * * * and if sufficient reason be shown, shall order the Constable to summon a jury," &c.

This statutory provision is in derogation of the free and unrestricted use and enjoyment of the land by the owner thereof, over which the cart-way is established, and must be construed strictly. The petitioner is not entitled to have it simply as a convenience, or because it enables him to reach a public road, ferry, bridge or public landing from the land upon which he may reside, or which he may be cultivating, by a shorter or more convenient route, but because there is no public road serving such purpose, and because, also, it is necessary, reasonable and just that he should have the cart-way. Hence, if he have one or more private ways, or, by a parol license, an unobstructed way across the land of some person other than that of the respondent, he is not entitled to have it. In such case it would not be "necessary, reasonable and just" that he should have it. If he should, in any way, be deprived of such private ways, he might become entitled to the cart-way, because it might thus become necessary as contemplated by the statute. It is the absence of a public road in the case provided for, and because it is "necessary, reasonable and just," that the petitioner may have a cart-way across the land of another. *Lea* v. *Johnston*, 9 Ired., 15; *Caroon* v. *Doxey*, 3 Jones, 23; *Burgwyn* v. *Lockhart*, 1 Winst., 269; *State* v. *Purify*, 86 N. C., 681.

The application for a cart-way must be made by petition in writing, and it should state intelligently the grounds of application—the facts, sufficient in their substance, to entitle the petitioner to have his prayer granted. Otherwise, the

respondent may move to dismiss or quash it, or the Court may, *ex mero motu*, direct it to be done.

And so, also, the respondent's objections to the petition should be in writing, to the end the same may be filed in the proper office, and so, also, that the Court may see what issues of fact and law are raised, and try the same, and dispose of the petition upon its merits

It would be much better to have such pleadings formal and precise—thus they would be more intelligible and satisfactory—but this is not essential; it will be sufficient, if the petition and the objections thereto state the substance of the material facts, however informally this may be done, and even informalities should be helped by proper amendments, and the proceedings should be upheld when they embody the substance of the matter. They are summary in their nature, and are begun and prosecuted before a class of officers very useful and important, who are, generally, laymen, and not familiar with legal precision and forms. Such proceedings are to be helped at all times, when this can be done by amendment. This is especially so, when they have been allowed to be conducted without prompt objection made in apt time.

The petition in this case is not precise or formal in the allegation of the material facts, but it seems to us that it states facts sufficient in their substance and necessary to entitle the petitioner to have his prayer granted, if they be accepted as true, as they must be for the present purpose.

First, it was necessary to allege that the petitioner was "settled upon or cultivating" land. The petition asks for a "cart-way leading from his dwelling and lands, and through the lands of Sarah Lowman, into the public highway" mentioned. By the words "his dwelling and lands" is fairly meant his home—the place where he lives—where he is "settled," and this meaning is made the more manifest by other facts stated in the petition. Secondly, the petition

should have stated that there was no public road leading to the dwelling of the petitioner—the place where he was "settled." This is sufficiently alleged, in the absence of objection made in apt time, in that it is informally stated that the cart-way prayed for "is his *only way* to his nearest church and public worship, Sunday-school and burying-ground, said way or route being the only practical way that the petitioner can travel to either of the above-named places by wagon, buggy or cart." And the implication intended is, that the petitioner has no other way than the cart-way asked for to reach a public road leading to the public places mentioned, and no other way leading from a public road to his residence and his blacksmith shop.

It seems that the parties so understood, accepted and acted upon the meaning of the petition until after the jury was impaneled to try the issues of fact raised in the Superior Court. The petition states facts which, if true, sufficiently allege that the cart-way was necessary, reasonable and just. If the petitioner had no way to a public road from his residence—the land where he lived—surely he ought to have a cart-way. It may be that these allegations were not true; but the Court deprived the petitioner of the opportunity to prove them, by directing a new trial and dismissing the petition. They were informal, not perfect, but the purpose and the ground of it could be seen and understood by the parties and the Court, and it was too late, after the jury was impaneled, to try the issues of fact raised to sustain a motion, then made for the first time, to dismiss the petition upon the ground that it did not sufficiently state the facts to entitle the petitioner to have the cart-way prayed for. *Johnson* v. *Finch*, 93 N. C., 205; *Halstead* v. *Mullen*, *ibid*, 252; *Warner* v. *Railroad Co.*, 94 N. C., 250.

There is error. The Court should have disposed of the case upon its merits. There must, therefore, be a new trial, and we so adjudge.

Error. *Venire de novo.*

R. F. COOK v. T. L. PATTERSON.

Usury—Costs—The Code, §§ 528, 3826.

1. A mortgagor applied for an injunction to restrain the mortgagee from selling under the mortgage, alleging that the debt secured was usurious, and that he was entitled to sundry credits. The mortgagee denied the usury, but the issue on that plea was found against him: *Held*, that defendant was entitled to judgment for the amount actually due on the mortgage debt, with interest, and, under *The Code*, § 528, for costs.
2. One who goes into a court of equity to seek relief from a usurious contract, will be required to pay legal interest, which, under *The Code*, § 3836, is eight per cent., if the contract is to pay that rate.

CIVIL ACTION, tried before *Brown, J.*, at February Term, 1889, of IREDELL Superior Court.

The plaintiff alleged in his complaint that, being embarrassed with debt, he applied to defendant for the loan of three hundred and fifty dollars, with which to pay off his indebtedness; that defendant agreed at first to lend that amount, if he could secure payment by a mortgage on a certain tract of land, charging eight per cent., and a small bonus to cover expenses, but when the plaintiff applied for the money in order to fulfill his promise to his creditors, the defendant required him to execute a note for three hundred and ninety dollars ($390), with interest at eight per cent. per annum, when, in fact, he lent plaintiff only three hundred and fifty dollars.

Plaintiff further alleges, that defendant stated that he required a bonus of forty dollars for the loan, and that he did execute a mortgage on the land first mentioned by defendant, to secure the payment of said note for $390, dated February 11, 1884, and that the defendant had advertised the said land, and was threatening to sell by virtue of said mortgage, and that since the execution of the note, the

plaintiff had made several payments on the note. The plaintiff prayed for an injunction.

The defendant averred, that he lent plaintiff, and actually furnished him, three hundred and eighty dollars in money; that he charged plaintiff ten dollars for cost of getting an abstract of title to his land, and therefore took the note for $390, with interest at eight per cent. per annum.

At the trial, the following issues were submitted to the jury, viz.:

1. "Was the sum of $40 or any other sum included in the note as excessive interest over eight per cent.? If so, what sum?" Answer, "Yes; thirty dollars."

2. "What payments have been made by the plaintiff thereon?" Answer, "February 6, 1886, $51.50; November 11, 1886, $25.75. Total, $77.25."

The findings of the jury were as above indicated.

Upon these findings of the jury and the pleadings, the defendant moved the Court for judgment for the amount of his debt and legal interest and costs of action. The Court declined such judgment, and, upon motion of plaintiff's counsel, ordered judgment for defendant, for the sum of $360, less credits, $77.25, and declined to allow defendant any part of the legal interest due upon said debt, or any costs up to and including this term of the Court. Defendant excepted, and appealed.

No counsel for the plaintiff.

Messrs. Chas. Armfield and *W. D. Turner*, for the defendant.

DAVIS, J. (after stating the facts). The defendant, after reducing the amount apparently due by payments, and making allowance for usurious charges, was entitled to recover a judgment. There was no allegation that the whole debt had been paid, or, in any view of the case, forfeited; and judgment was actually rendered for three hundred and sixty

dollars, less the payments, ascertained by the jury to have been made, or for $282.75.

Section 528 of *The Code* provides that to either party for whom judgment shall be given, there shall be allowed, as costs, his actual disbursements, &c. It is clear that the defendant was entitled to recover costs. In *Costin* v. *Baxter*, 7 Ired., 111, the facts were, that the plaintiff declared in three counts, and entered a *nolle prosequi* in two, but recovered on the remaining count. This Court held that the defendant was not entitled to recover for charges of witnesses summoned to meet the counts abandoned by plaintiff, upon a proper construction of the act of 1777. Rev. Stats., ch. 31, § 79.

In *Wooley* v. *Robinson*, 7 Jones, 30, it was held that the party who prevailed and obtained judgment must recover costs, under Revised Code, ch. 3, § 75, unless otherwise directed by some particular statute. The older statutes, construed by the Court in those two cases, do not differ materially, so far as the question before us is involved, from section 528. In the absence of any special provision of law taking this case out of the general rule, it should have been followed in rendering judgment.

This is not an action brought to recover usurious interest under section 3836 of *The Code*. The action was, in fact, brought more than two years after the first payment made on the note, but the plaintiff declares, in his complaint, that he is willing to pay the amount due, with legal interest at eight per cent. The defendant moved the Court for judgment for the amount of the debt, after making the deduction, with legal interest, and we think that, in refusing this motion, his Honor erred also. If the defendant had invoked the aid of the Court by asking for a judgment for his debt, the rule adopted by the Court below would have applied. But when the plaintiff asks the Court to interfere and grant an

injunction till the true amount can be ascertained, he is deemed subject to the rule, that one who seeks equitable relief must do equity. The Court will, therefore, compel him, as a condition upon which the aid of the Court is extended to him, to pay the amount that is justly due in good faith. *Manning* v. *Elliott*, 92 N. C., 48; *Purnell* v. *Vaughan*, 82 N. C., 134; *Simonton* v. *Lanier*, 71 N. C., 498.

In the two first of the cases cited, it was held that the condition upon which relief is granted in cases of this kind, is the payment of what is really due. The plaintiff contracted to pay interest at eight per cent., and it was lawful to agree to that rate on the amount found to be really due ($360). Moreover, in his complaint he tenders a judgment for the amount justly due and legal interest at eight per cent. That rate was allowed in *Simonton* v. *Lanier* by this Court, when, in fact, the defendant had agreed in the note to pay interest at the rate of one and a half per cent. per month. It is just and equitable that he should perform so much of the agreement, on his part, as was not in contravention of law.

The judgment must be modified in conformity with this opinion.

Error. Modified.

E. A. and R. C. PERKINS et al. v. B. A. BERRY, Adm'r.*

Judgments—Exceptions to Evidence and to Report of Referee—The Code, § 422—Joinder of Uninterested Party as Plaintiff—Statute of Limitations—Creditor's Bill; when Heirs of Decedent Necessary Parties.

1. Where a judgment absolute is rendered against executors, fixing them with assets, and they pay it, their personal representatives cannot afterwards recover the amount thus paid out of the estate of their testator.
2. An exception to the admission of evidence by a referee, after objection, which is not specific, but is vague and indefinite in form, will not be considered.
3. Where the report of a referee designates certain claims which he finds to be valid against the defendant, as claims of "officers of the Court": *Held*, that such designation sufficiently points out the Clerk to whom payment is to be made.
4. Under *The Code*, § 422, a referee has power to admit new parties to an action.
5. It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with the assent of the other.
6. That the referee has not reported *all* the evidence taken during the trial before him is not a ground of *exception*. If all the evidence is not sent up, the remedy of the prejudiced party is, by application to the Judge for an order directing the referee to send up that which has been omitted.
7. The issue of execution every three years on a judgment against executors will repel the bar of the statute of limitations.
8. Where, in a creditor's bill against the personal representative, it is sought to have the lands of decedent sold for the satisfaction of the debts proven, the real representatives of decedent must be made parties, before any judgment subjecting the real estate can be entered.

* AVERY, J., did not sit.

PERKINS *v.* BERRY.

CIVIL ACTION, tried, by consent, before *Clark, J.*, at Chambers, upon exceptions to the report of a referee, in an action pending in the Superior Court of BURKE County.

Both sides appealed.

The facts are stated in the opinion.

Messrs. J. T. Perkins, J. B. Batchelor and *I. T. Avery*, for the plaintiffs.

Mr. S. J. Erwin, for the defendant.

SMITH, C. J. This action is prosecuted by the plaintiffs in behalf of themselves and all other creditors of John Sudderth, deceased, against the defendant, his administrator *de bonis non*, with the will annexed, for an account and settlement of the testator's estate, and the payment of their several debts. The deceased died in February, 1865, leaving a will, which has been admitted to probate, appointing three executors, to-wit, W. S. Sudderth, John R. Sudderth and Joseph Corpening, all of whom qualified as such, and entered upon and proceeded to discharge the duties and trusts imposed. In March, 1874, the executor John R. Sudderth died intestate, and without committing any waste, having properly applied the assets that came into his hands. In like manner the executor Joseph Corpening died intestate, in the year 1883, without having completed his administration, as did the sole surviving executor two years thereafter, also intestate, leaving the administration incomplete.

On the 25th day of May, 1885, after a controversy and final adjudication thereof in regard to the party entitled, letters of administration *de bonis non* issued to the defendant. At Fall Term, 1888, was entered the following order of reference:

"This cause coming on for hearing, a jury trial being waived, it is, by consent of counsel for plaintiffs and defendant, referred to T. G. Anderson, Esq., with leave to plaintiffs

to amend their complaint within twenty days, and leave to defendant to amend answer in ten days after filing of amended complaint. The said referee to find and pass upon all matters of fact or law, without prejudice, however, to the defendant's plea of the statute of limitations, all rights of defendant under said plea being reserved, and all other matters by consent referred. Said referee to report his findings of fact and conclusions of law to the Judge presiding of this Court at Chambers, in Marion, McDowell County, on Tuesday of the first week of the Superior Court of McDowell County, where the same is, by consent, to be heard before Hon. Walter Clark, Judge presiding Tenth District."

The complaint and answer were amended accordingly, and several new parties having been admitted into the action, on their application to the referee, he proceeded with the execution of the order, and made his report, so much of which as is necessary to the proper understanding of the rulings of the Court and the exceptions thereto, brought up for review, is produced.

In the progress of the cause various other creditors were admitted as plaintiffs, all of whom filed evidence of their debts. An object of the suit is also to have the lands left by the intestate, and which are of great value, sold to supply any deficiency in the personal estate to meet the outstanding liabilities of the testator, and to compel the defendant, who has no assets himself, when the indebtedness is ascertained and the value of the personal estate available for the payment, to institute proper proceedings for the sale of the devised lands, or so much as may be required, for conversion into assets, to be applied to the deficiency.

The referee reported the following facts as admitted by the parties:

"I find from admissions in evidence and from pleadings—

"1. That John Sudderth died in Burke County, State of North Carolina, in the month of February, 1865, leaving a

last will and testament in which John R. Sudderth, W. S. Sudderth and Jos. Corpening were appointed executors, and soon thereafter, in the year 1865, they qualified as executors.

"2. That John R. Sudderth died on the first day of March, 1874; Jos. Corpening, on the — day of ——, 1883, and W. S. Sudderth, on the 18th day of March, 1885, without having fully administered said estate, and B. A. Berry was appointed administrator *d. b. n.* of said John Sudderth on the 25th day of May, 1885, and no final account has ever been filed or final settlement made of said estate.

"3. That there is not and ought not to be any personal property whatever in the hands of B. A. Berry, administrator *d. b. n.*, with which to pay debts of said estate, and that John Sudderth died seized of, and there is now in the hands of his devisees, real estate and outlying lands sufficient to pay off all indebtedness of said estate."

Then, after enumerating a number of the claimants whose debts are not disputed by the defendant, and whose amounts are specified, the referee proceeds to find the facts and the law arising on each, except the operation of the statute of limitations and the effect of the lapse of time, which we give in the words of his report:

"As to the claims of C A. Little, administrator of Joseph Corpening, and R. J. Hallyburton, administrator of W. S. Sudderth, which claims are embodied in one and founded upon the same facts, I find from the evidence, and from the records introduced in cases of John Haigler *et al. v.* Executors of John Sudderth, and T. G. Walton, administrator of Robert Slough, *v.* Sudderth Executors, the following facts: That in 1882, T. G. Walton, administrator of Slough, brought suit against Jos. Corpening and W. S. Sudderth, surviving executors of John Sudderth, for legacy of $1,000 bequeathed to said Slough by said John Sudderth, and recovered judgment against said W. S. Sudderth and Jos. Corpening, surviving executors as aforesaid, fixing them with the sum of

$1,941.38 as assets in their hands as executors of said estate, and that plaintiff do recover of defendant executors the sum of $1,000, to be paid out of the assets belonging to the estate of John Sudderth found to be in the hands of defendant executors, and that he do recover of defendants individually the sum of $1,000, and that upon failure of defendants to pay said sum and interest out of the assets in their hands belonging to the estate of John Sudderth in ninety days, that plaintiff have execution against the lands and tenements, goods and chattels, of defendants individually, for said amount and for cost.

"And that thereafter, on the 14th September, 1882, defendant executors borrowed from one Joshua Kidd the sum of $2,000, giving him their note as executors and authorizing an assignment to him, as collateral security, of the Slough judgment, which was assigned, said loan being to pay said judgment; and thereafter, on the 12th of June, 1883 (Jos. Corpening having died and C. A. Little having been appointed his administrator), Joshua Kidd was repaid said sum and interest by W. S. Sudderth, executor, and C. A. Little, administrator of Joseph Corpening, and the judgment held by Kidd as collateral security was receipted, satisfied and discharged by him; and the claim of C. A. Little is for $1,714 of said amount paid by him as administrator, and the claim of R. J. Hallyburton (who has since been appointed administrator of W. S. Sudderth) is for $326 of said amount paid by W. S. Sudderth on said note; which claims I find, as matters of law, to be not valid nor subsisting claims, but no claims whatever, the said judgment being absolute, and an individual judgment fixing the executors with assets being *de bonis testatoris, si non de bonis propriis.*

"As to the claim of J. R. Martin, I find that a Justice's judgment was rendered in favor of W. E. Powe, executor, and against W. S. Sudderth and Jos. Corpening, in the sum of $154.80, with interest from 10th September, 1870, till paid,

and cost, on the 10th day of September, 1870, which judgment was assigned to John R. Martin by W. E. Powe, executor, for value received, on 17th August, 1875, and on said judgment is a credit of $50, paid to J. R. Martin by W. S. Sudderth, executor, on 15th March, 1880, and on said judgment executions have issued within the space of every three years regularly since 1870. And I find as a matter of law, that said judgment is a valid and subsisting claim for the amount of $104.80, cost, against the estate of John Sudderth, unless barred by the statute of limitations, which was not referred to me to pass upon.

"As to the claim of E. A. and R. C. Perkins, I find that judgment was rendered on 25th of October, 1869, in the Superior Court of Burke County, in favor of T. G. Walton and against W. S. Sudderth, individually, and against W. S. Sudderth and Joseph Corpening and R. C. Pearson's administrators, in the sum of $1,129.97, with interest on $728.20 from 25th of October, 1869, till paid, and cost; and, after several credits on the judgment, W. S. Sudderth, the executor, borrowed of R. C. Perkins the sum of $300, and said judgment was assigned, to the amount of said sum of $300, to R. C. Perkins by T. G. Walton, to secure the payment of the same, and said $300 was paid to Walton on said judgment. I find that executions have issued regularly on said judgment within the space of every three years, and sundry payments have been made on said judgment by W. S. Sudderth to R. C. Perkins, as follows: November 17, 1877, $40; April 15, 1879, $25; March 6, 1880, $20; February 5, 1883, $50, leaving a balance of $165, and cost, due on said judgment, which I find, as a matter of law, to be due and owing said R. C. Perkins, and constituting a valid and subsisting claim against the estate of John Sudderth, deceased, unless the same is barred by the statute of limitations; and I find that E. A. Perkins has one-half ($\frac{1}{2}$) interest therein, the two,

E. A. and R. C. Perkins, holding all their property in common, and said judgment is *quando*, and on a cause of action arising prior to 1st July, 1869.

"As to claim of R. J. Hallyburton, I find, from the uncontradicted testimony of R. J. Hallyburton, that he was employed by W. S. Sudderth and Joseph Corpening, executors, to do some surveying for John Sudderth's estate, for which he was to receive $2 per day, and that he worked seventy days and received $63 60, and the work was done in 1882, 1883, 1884 and 1885. I further find that part of the work he did for W. S. Sudderth, executor, was for Sudderth, partly, as agent for the Erwin heirs and Mrs. John McDowell, and that, as executor of John Sudderth, W. S. Sudderth acted as agent of the Erwin heirs and Mrs. McDowell, and that all the work he did for Sudderth, as executor alone, took only one day's time; all of which I find from the testimony of R. J. Hallyburton. And, upon the foregoing facts, I am of opinion, and find as matters of law, that the estate of John Sudderth is not liable for the work engaged to be done by W. S. Sudderth, executor, as agent of Erwin heirs and Mrs. McDowell, and, therefore, find the claim of R. J. Hallyburton to be valid and subsisting for the one day's work which he did for the estate alone, amounting to $2.

"As to the claim of the officers of the Court in case of R. & M. Hennessee, I find that judgment was rendered in their favor and against W. S. Sudderth and Joseph Corpening, executors of John Sudderth, for the sum of cost at Spring Term, 1869, of Burke Superior Court, and that executions have issued regularly thereon within every three years, and that the sum of $13.25 is now due and owing thereon, which said sum I find, as matter of law, to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute of limitations. And I further find that cause of action on which judgment was recovered as aforesaid arose prior to the 1st day of July, 1869.

"As to the claim of officers of the Court in Allen Berry *v.* Sidney Deal, and W. S. Sudderth and Joseph Corpening, executors of John Sudderth, I find the judgment was rendered at Spring Term, 1881, Burke Superior Court, in favor of said plaintiff and against said defendants, for cost, and the sum of $81.45 is now due on said judgment, unless it is barred by the statute, which sum I find to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute.

"As to claim of officers of Court in Fannie and Barbara Huffman *v.* The Executors of John Sudderth, I find that judgment was rendered at November Term, 1877, of Burke Superior Court, in favor of said plaintiffs and against the executors of John Sudderth and J. C. McDowell and wife and J. H. Pearson for costs, and that executions have issued regularly thereon within the space of every three years; and I find from Wakefield's report, page 52, that said cost was admitted by executors, and found to be outstanding against said estate, and the sum of $117.20 is amount now due thereon, which said amount I find to be a valid and subsisting claim against estate of John Sudderth, unless barred by the statute of limitations.

"As to the claim of the officers of the Court in case of Joshua Kidd, I find that judgment was rendered in favor of said plaintiff and against the executors of John Sudderth for cost, and that execution has issued on said judgment regularly within the space of every three years, and the amount of cost now due is $48.85, which sum I find, as a matter of law, to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute.

"In the claim of officers of the Court in case of Jas. Harper's Executors *v.* John Sudderth's Executors, I find that judgment was rendered in favor of said plaintiffs and against said defendant's executors at Spring Term, 1869, Burke Superior Court, for cost; that the amount of costs now due thereon is

$25.10, which judgment (as are all the above claims of the officers of the Court) is acknowledged by the executors to be valid, on page 52, Wakefield's report, and which amount I find, as matter of law, to be a valid claim against the estate of John Sudderth, unless barred by the statute of limitations; and I further find that the cause of action upon which said judgment is founded arose prior to 1st July, 1869.

"As to claim of officers of the Court in case of John Sudderth's Executors *v.* Woodward & McNeely, I find that judgment was rendered in favor of said plaintiffs and against said defendants, at Spring Term, 1869, of Burke Superior Court, for the sum of ____ and cost, and that executions have issued regularly within every three years, from 1874, on said judgment, and returned 'nothing made'; that defendants are insolvent and nothing can be made out of them, and plaintiffs' cost in said judgment is $10.60, and the cost of the officers of the Court is $10.60, which amount I find, as a matter of law, to be a valid and subsisting claim against the estate of John Sudderth, unless barred by statute; and I further find that the cause of action on which said judgment was rendered arose prior to 1st of July, 1869.

"As to claim of officers of the Court in Sudderth's Executors *v.* Leander Powell, I find that judgment was rendered in favor of said plaintiffs and against said defendants at Spring Term, 1869, of Burke Superior Court for cost, and the sum of $11.50 is plaintiffs' cost incurred therein; that executions have issued on said judgment regularly within every three years since 1875, and returned 'nothing made,' and said Leander Powell is insolvent; wherefore, I find, as matter of law, that officers of Court have valid and subsisting claims against plaintiffs for said sum of plaintiffs' cost, $11.50, unless barred by the statute. And I further find, that the cause of action upon which said judgment was rendered arose prior to 1st July, 1869.

"As to claim of officers of Court in case of John Sudderth's Executors *v.* Hunt & Murdock, I find that judgment was rendered at Fall Term, 1869, in favor of said plaintiffs and against said defendants for ---- and costs; that executions have issued regularly thereon within every three years, and returned 'nothing made;' that defendants are insolvent, and that the sum of plaintiffs' cost therein is $19.45, which sum I find, as a matter of law, to be a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute.

"As to claim of officers of Court in Sudderth's Executors *v.* Moses & McNeely, I find judgment was rendered for plaintiffs and against defendants at Spring Term, 1869, of Burke Superior Court; that executions have issued regularly thereon within the space of every three years, and returned 'nothing made;' that defendants are insolvent; that amount of plaintiffs' cost is $19.70, for which sum I find, as a matter of law, that said officers of Court have a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute; and I find said cause of action on which said judgment was rendered arose prior to 1st July, 1869.

"As to claim of officers of Court in Sudderth's Executors *v.* W. F. McKesson, I find that judgment was rendered for plaintiffs and against defendant in Burke Superior Court, for ---- and costs, and executions have issued regularly thereon within the space of every three years, and returned 'nothing made;' that defendant is insolvent; that plaintiffs' cost is $12.50, for which amount I find the officers of Court have a valid and subsisting claim against the estate of John Sudderth, unless barred by the statute. Said judgment was rendered at Spring Term, 1882.

"I further find, in regard to the appointment of B. A. Berry, administrator *d. b. n.* of John Sudderth, from examinations of records in C. A. Little *et al. v.* B. A. Berry, administrator, that said appointment was appealed from and went

to the Supreme Court, where it was finally decided in favor of Berry, and judgment rendered in accordance, at Fall Term, 1886, of Burke Superior Court.

"I further find, that S. T. Pearson was appointed receiver of the estate of John Sudderth on the 28th day of January, 1885—W. S. Sudderth having been restrained and enjoined from meddling with said estate, and ordered to file bond as executor or show cause why he should not be removed, and said W. S. Sudderth died pending the said hearing"

Of the four exceptions taken by the plaintiffs, to the referee's report, only one, No. 3, is overruled, and that is, in substance, as follows: The finding in reference to the claim of R. J. Hallyburton, that, in his charge for surveying, he was entitled to charge the testator's estate for one day's work only, is contrary to the evidence, which shows that the entire service rendered, during the seventy days while he was thus engaged, was at the instance of the executors, and the estate should pay at least one-half of the sum charged, the testator being a joint owner of the land surveyed, with Erwin and McDowell.

The findings, under the terms of the consent reference, are conclusive upon all matters of fact, and the referee expressly reports that, while the surveyor's work was done at intervals in four years time, the executor W. S. Sudderth was, at the same time, acting as agent of the Erwin heirs and for Mrs. John McDowell, in giving him employment, and that the surveying for the testator's estate took but a single day. This he derives from the testimony of Hallyburton himself.

Assuming that the surveyor was employed by the said W. S. Sudderth, in the twofold capacity stated, with no proof of a joint contract, the division of the debt was proper.

Exceptions of C. A. Little, administrator of Joseph Corpening, and of R. J. Hallyburton, administrator of W. S. Sudderth:

These parties, whose claims rest respectively upon the same facts, and whose exceptions are to one and the same ruling, object to the exclusion of their claims from the general indebtedness, for the assigned reason, that the judgment rendered against the executors *was personal and absolute*, and charged them with the possession of assets sufficient to meet it. This, it is insisted, is in conflict with the record produced in the action of Haigler and Sudderth, in which every heir, devisee, next of kin and executor of John Sudderth were before the Court, and the debt was adjudicated a valid and subsisting debt due from the testator's estate.

The facts upon which the ruling complained of was made are set out fully in the referee's report, and his conclusions of law seem reasonable and just.

The action was for the recovery of a *pecuniary legacy*, bequeathed by John Sudderth to one Slough, the plaintiffs' intestate, and not for any *indebtedness of the testator*, and his executors are fixed with assets for its payment. It was adjudged, moreover, that the plaintiff have execution, if the judgment be not paid in ninety days out of the trust effects, against the *individual property* of the defendants. The defendants afterwards borrowed the money with which to pay the judgment, giving their note *as executors*, but, in law, a personal obligation, to secure which the plaintiff creditor, to whom the money was paid, assigned the judgment. W. S. Sudderth, executor, and C. A. Little, administrator, of the deceased executor, Joseph Corpening, subsequently discharged the loan note held by Kidd, who thereupon discharged the judgment assigned as collateral security. The claim now preferred is for $1,714 of the amount, by Little, and for $326, the residue, by Hallyburton, who has administered since on the estate of W. S. Sudderth. The demand has no support in law, and the action of the Court in overruling the exception must be sustained.

The defendant's exceptions, eleven in number, are all overruled, except two, to amend which leave is granted, and these also when so amended as to remove the objections entered to their forms.

First Exception.—This is directed to the hearing of testimony from the plaintiffs who instituted the suit—R. J. Hallyburton, an admitted party, and S. T. Pearson, Clerk of the Court—in regard to personal transactions and communications with the deceased executors, W. S. Sudderth and Joseph Corpening, during their lives. If there be any force in the objection to the testimony as delivered, inasmuch as it is not specified so that the Court can see that it comes within the inhibition of § 590 of *The Code*, and the exception is, in form, vague and indefinite, it cannot be entertained.

Second Exception.—The defendant objects to the allowance of claims for costs incurred and unpaid in divers actions decided against the executors, due the officers of the Court, as made without evidence of the liability of the testator's estate therefor. The exception embraces the series of cases in the referee's findings of fact which are seen under the words, "claims of officers of the Court" The referee bases his findings upon the inspection of the records of the Court in which the present action is depending, and in which are entered up the judgments. We are at a loss to understand the objection, that *there is no evidence* of these claims, unless it be that they cannot be preferred against the testator's estate. The designation of the claimants under the term used, "officers of the Court," sufficiently points out the Clerk, to whom payment is to be made, and, in some instances, the more indefinite expression is used, "the Clerk's office," under which may issue an execution for collection. *Clerk's Office* v. *Allen*, 7 Jones, 156, citing several cases; *Jackson* v. *Maultsby*, 78 N. C., 174; *Clerk's Office* v. *Huffsteller*, 67 N. C., 449.

Third Exception.—The answer to this exception is furnished in § 422 of *The Code*, which confers upon the referee

the power he exercised in admitting new parties to the action.

Fifth, Sixth and Seventh Exceptions.—The amendments allowed remove the ground of exceptions, thus numbered, that there is a variance between the allegations and proofs

Eighth Exception.—The same answer applies to this variance, but it is wholly immaterial that an uninterested party is united with the true owner of the debt, since a reception of payment by either would be with the assent of the other, their association, as joint creditors, being wholly voluntary. But if there be any deficiency from misdescription, it is remedied by the amendment authorized.

Ninth Exception.—The same disposition which is made of the second, must be made of this exception.

Tenth Exception.—The finding to which this exception is taken is, that there is a credit of fifty dollars endorsed on the judgment, as paid by the executor, W. S. Sudderth, to J. R. Martin, on March 15, 1880, not quite ten years after its rendition, and that executions have been, within the space of three years, regularly thereafter issued. If, as we must infer to make the findings self-consistent, the judgment was duly docketed, the continued issue of the executions will preserve the vitality of the debt, thus ascertained, without the aid of the effect of a partial payment in recognition, and hence the only consequence is a reduction of the debt, of which the defendant cannot complain.

Eleventh Exception.—The last exception is not in a form to be available. The application should have been for an order upon the referee, to be enforced, if necessary, to report all the evidence taken; and if this had been denied, it would be error, for some of the exceptions grew out of the evidence. The exception is, that *all* is not reported, not that none has been, and as this is a matter of fact, not of law, it must be understood that the exception arises out of a misapprehension of fact that any portion of the evidence has been with-

held. At least, as it does not appear that what is reported is not the whole, we must attribute the action of the Court to the absence of any evidence of its being partial.

The main essential matter in controversy, withdrawn from the referee and submitted, as matter of law, to the determination of the Court, is the defence set up under the statute of limitations, and this is dependent upon the facts reported. It is to be observed that all the judgments disputed were rendered since the limitations prescribed in the Code of Civil Procedure have become operative and controlling.

The ruling of the Court upon the reserved matter of defence is, that the claims of Little and Hallyburton, already decided not to be valid and subsisting against the testator's estate, even if they were so, are barred by the statute of limitations, and cannot, for this reason also, be now asserted, and that the recovery of none of the other demands preferred by creditors is obstructed by the statute. There are no specific exceptions entered and appearing in the record to the rulings of the Judge upon the reserved matter of the application of the statute, *as, properly, there should be,* to make the decisions reviewable. But, instead, it is stated in the case on appeal, signed by the Judge, that errors are assigned in the overruling of the exceptions of the defendant, and the adverse rulings upon the statutory defence arising out of the lapse of time, and that error is assigned by the appellants, Little and Hallyburton, in the adverse rulings as to their demand against its validity as such, and in applying the statutory bar to it. In disposing of the application of the statute to the several disputed judgments, it will be noticed that, as to most of them, leaving out of view the time in which there was no personal representative to sue, there have been issued, regularly executions to enforce them, within intervals of three years, since their rendition;

the only exceptions to which are the claims of Hallyburton for surveying work, that of Allen Berry, whose recovery was at Spring Term, 1881, of the Court, and that of James Harper, whose recovery was at Spring Term, 1869.

The two first excepted claims are not within the bar, and, in our opinion, the last is in the bar, and must be rejected. The ruling which applies the bar to the claim of Little and Hallyburton becomes immaterial, in view of the ruling against it, as a demand for which the estate is not liable.

As the action, in its amended form, seeks to enforce proceedings on the part of the defendant against those to whom have come the lands of the deceased testator, they, as interested in reducing the demands of creditors, should have been made parties thereto, so that they might interpose any such defences as would be made against them, and thus diminish the liabilities to which the real estate is exposed; and this should be in order to any ulterior action under the law for the sale of the land.

But we are informed by counsel that the defendant has already instituted an independent proceeding for this purpose. Should it get into the same jurisdiction as the present cause, it would be a proper case for a consolidation into one. Otherwise, and until the terre-tenants are made parties to this, it must terminate upon the adjudication of the matters herein embraced.

With the correction of the error in admitting into the list of debts that of James Harper's executors, the judgment must be affirmed.

Defendant's appeal. Modified and affirmed.

Plaintiffs' appeal. No error.

R. F. ARMFIELD and C. H. ARMFIELD, Ex'rs, v. WILLIAM F. COLVERT et al.

Evidence—The Code, § 590—Apt Time—Trial before Referee.

1. The executors of a deceased member of a firm sued the surviving partners for an account and settlement of the copartnership business. One of the defendants was allowed to testify that plaintiff's testator agreed with witness and the other partners upon a certain basis (which witness stated at length) for the adjustment of the affairs of the firm between the members thereof; and assented to a statement of each partner's interest in the firm, which appeared on the books of the firm: *Held*, that such testimony should have been ruled out upon plaintiffs' objection, as it was incompetent under § 590, *The Code*. But the witness had a right to testify that the books alluded to were kept among the papers of the firm, that decedent had access to them, and that many of the entries were in his handwriting.

2. In the above case, the plaintiffs introduced one of the defendants as a witness, who stated, without objection on the part of the defendants, that plaintiffs' testator contributed a certain sum towards the copartnership capital: *Held*, that plaintiffs did not thereby open the door so as to permit defendants to testify as to other transactions between them and plaintiffs' testator.

3. Upon a trial before a referee, one of the parties objected to certain testimony as it was given in, but the referee did not then make a note of such objections, but at the end of the written evidence as taken down by him, he noted that the evidence in question had been objected to "in apt time": *Held*, that this was a sufficient noting of the objection, and from it the Court would assume that the objections were made as the evidence was offered.

CIVIL ACTION, tried before *Clark, J.*, at November Term, 1887, of IREDELL Superior Court.

There was judgment overruling plaintiffs' exceptions to the report of a referee and confirming the report, whereupon, the plaintiffs appealed.

The plaintiffs brought the action for the settlement of the partnership affairs of the firm of Gaither & Colvert,

composed of the testator of plaintiffs, A. F. Gaither, and the defendants Wm. I. Colvert, John G. Colvert, J. C. Stimpson, W. G. Bennett and W. C. Nicholson.

This partnership was formed in the year 1876, and the partners continued to carry on the business of buying and selling leaf tobacco, and of manufacturing plug and smoking tobacco, till about the year 1880.

A. F. Gaither, testator of the plaintiffs, died in 1883, leaving a last will and testament, in which plaintiffs were appointed his executors, and they have duly qualified as such. W. G. Bennett had died before the hearing, and a *nol. pros.* was entered as to him by the plaintiffs. The cause was referred, and on the coming in of the report of the referee, a number of exceptions were filed by the plaintiffs, but all were overruled by the Court below, and a judgment was rendered, confirming the report of the referee.

The first witness offered for the plaintiffs before the referee was W. G. Nicholson, one of the defendants, who testified that he himself put $1,065 into the business, A. F. Gaither about $2,000, W. I. Colvert about $2,000, John G. Colvert about $1,000, J. E. Stimpson about $1,000, and W. G. Bennett about $1,000. He testified further as follows: "I think W. I. and J. G. Colvert kept the books of the firm most of the time. W. I. Colvert, J. G. Colvert and A. F. Gaither were the principal managers of the firm. W. I. Colvert paid out all the money that I ever saw paid. I think that J. G. Colvert paid out some money. A. F. Gaither had the privilege and access to the books of the firm, but, to my knowledge, had but very little to do with the books. I do not know who has the books at this time, nor do I know who had them at the dissolution of the firm. The firm had, at its dissolution, one hydraulic press, worth $250."

After giving a list of articles of property owned by the firm, and the value of each article, and stating that he did not know what credits the firm had, the witness was turned

over to defendants for cross-examination by W. I. Colvert and John G. Colvert, when, in answer to a question, he said:

"As to sums put in by the partners aforesaid, my knowledge was derived from a meeting that the partners had. Amos F. Gaither told me he put in $2 000."

This was objected to by the Colverts and Stimpson as incompetent.

The witness continued: "No one was present at the time A. F. Gaither told me he had put in $2,000; I did not hear Gaither say, at the meeting above referred to, that he had put into the firm $2,000; I heard, at said meeting, J. G. Colvert say that A. F. Gaither had put in about $2,000; I also saw said amount stated in a book, being the same book in which my subscription was written."

It is not material to give all of the testimony of this witness.

We find, among the exceptions filed by the plaintiffs, and relied on in the argument, the following, to-wit:

"11. That he erred in considering the evidence of William I. Colvert, John G. Colvert and J. E. Stimpson, concerning transactions and communications with A. F. Gaither, the testator of the plaintiffs, when the record of evidence shows that the same was objected to, and that the same was incompetent under § 590 of *The Code*."

The testimony of John G. Colvert, so far as it relates to transactions or communications, seems to have been objected to, as the obnoxious portions of his testimony were elicited from him; but the referee entered the objection at the close of the testimony. The testimony of J. G. Colvert bearing upon this question is as follows, to-wit:

"The entries on pages 102 to 106 were not made four or five years after the old firm ceased to do business, except the last two lines on page 106, which were made in the latter part of 1876, from page 102 to 106 inclusive. All from 102 to 107 was a settlement of the old partnership, *and agreed to*

by all the partners. The agreement between the partners of the old firm was to take an aggregate of the debts and credits, and the difference between them was to be the ratio of their part in the new firm of the $13,547.40. A. F. Gaither was considered an ordinary business man by some, and good by some. It was the object of the partners of the old firm to make a just settlement in proportion to the difference of debits and credits, as shown on page 107."

"When the settlement was made between the old partners of the firm of A. F. Gaither, was it not done upon the basis of their respective interests in said firm?"

"It was, as shown on page 107, after deducting their debits—after their interests were prorated through the $13,547.40. I think there is no error making $263.57 the basis of A. F. Gaither's interest in the old firm. If there is a clerical error, I am willing to have it corrected. A. F. Gaither put into the old firm, at sundry times, $2,808.25. I did not consider the indebtedness of the partners to the old firm, but considered the difference of the debits and credits as assets of the new firm. The list made from pages 102 to 106 was made by Gaither and myself, we having been appointed, at the first meeting in 1876, as a committee to value the machinery and take a list of all notes and accounts of the old firm. All the members of the new firm were present at this meeting. Gaither and myself took the list in the middle of 1876, and after the said meeting. The reason why we did not take the list at once was, that there were teams out, and we had to get up the notes and money before we could take the list. We went to the factory and examined the machinery, and valued it, as the books show; notes were taken by Gaither, calling out the names of makers of the notes, and the amounts, and the witness wrote them down in book 'A.' This book, after the entries were made, was left in firm's office, in a safe in said office. A. F. Gaither had access to the office and safe. Most of the

entries on page 2 are in the handwriting of A. F. Gaither, and said page contains a portion of W. G. Nicholson's account. Some entries on page six were made by A. F. Gaither, and contains a portion of W. G. Nicholson's account: Cash paid $100, July 7, 1877; August 1, 1877, cash paid $200; by amount of account at Augustus Sharp's, August 11, 1877, $100. I see on page 6 the word *paid*, and it is spelled 'paide,' Gaither's usual way of spelling this word. The most of the entries on page 59 are in Gaither's handwriting; I find *paid* in several places on this page, and spelled 'paide,' which words were written by Gaither. Some entries on page 58 are in the handwriting of Gaither, containing, in part, W. G. Bennett's account. Gaither, W. I. Colvert and myself kept book 'A,' and made entries in it. On page 102 the item entered as cash on hand, $7,126.67, was the cash on hand at the formation of the new firm, together with what was collected before the list was made, on the old debts, and a small quantity of leaf tobacco, estimated as cash, at what it was bought at; also some smoking tobacco, which came from the old firm. The hydraulic press and shapes and retainers, sold in December, 1883, had been in use from and before the creation of the new firm, and up to the time that the firm ceased to do business, in 1880. G. W. Nicholson, J. E. Stimpson and myself were present at the sale of the machinery and other property; the sale was at public auction; Dr. Nicholson did not buy any of the articles sold; he did not forbid the sale, and made no objection, so far as I heard. I think Gaither took the watch above referred to, for the debt, and I think the trade was done by writing; I think the debtor, from whom the said watch was purchased, lived in South Carolina."

Plaintiff and defendant Nicholson, in apt time, objected to all the foregoing evidence touching any matter with A. F. Gaither.

A. F. Gaither's book "A" is offered in evidence by defendants Colvert and Stimpson, to which the plaintiff and defendant Nicholson object.

Cross-examination of Dr. W. G. Nicholson resumed: "A. F. Gaither made some entries on page 2 of book 'A.' I say positively, that A. F. Gaither made no entries on page 6; Gaither made, on page 58, an entry of one line; I think that there is no other entry on said page in Gaither's handwriting; Gaither made one entry on page 59, 'Paid, May, June, $100.' I can't say there is any other entry by Gaither on said page; I was frequently about the office during the existence of the firm, and never inspected my own account, as kept there in the books of the firm. Did not have an opportunity to inspect the books; I never asked to inspect them, nor was I ever refused by any one to do so. I think it very doubtful whether I could have seen the books if I had asked."

It appeared, also, in evidence, that there was a firm doing business under the name of A. F. Gaither, prior to the year 1876, composed of A. F. Gaither, W. I. Colvert, J. G. Colvert and J. E. Sharpe, and the assets of the old firm were put into the new.

The adjustment of the debits and credits of each partner in the firm of Gaither & Colvert was made, therefore, to depend, in some measure, upon the amount of his share in the property and money of the old firm merged into the new.

It is not necessary to give the report of the referee in full. One of the conclusions of law is as follows:

"A. F. Gaither is indebted to the firm of Gaither & Colvert $1,529.38, money and goods taken out of said firm more than he put in, aside from the stock originally put in by him. Saved of said Gaither's original stock, which he will be entitled to retain, the sum of $213.45, which sum is to be deducted from the aforesaid sum of $1,529.38, leaving $1,315.93. I, therefore, direct that judgment be rendered

against the plaintiffs in this cause for the sum of thirteen hundred and fifteen dollars and ninety-three cents in favor of the firm of Gaither & Colvert."

On the top of page 102 of the book "A" is the following entry:

"Below is a list of cash, amount of tobacco, machinery and value, amount of due bills, notes, and other articles and value, &c, belonging to A. F. Gaither, J. G. Colvert and J. E. Stimpson (the old tobacco firm), when W. G. Nicholson and W. G. Bennett came into the firm in the spring of 1876."

Then follows, on page 102 to 106, an inventory of the cash, property and value, and the solvent credits of the old firm put into the new. The entries begin:

Cash on hand	$7,126 67
Memson, Gaither & Co.	390 66
Hydraulic press and retainers	475 00
Two sets of shapers	210 00
Pair of bank scales	20 00
The aggregate value of all of the assets of the old firm reached, on page 106, is	$15,863 27
Deducting all notes uncollected	2,315 87
The result stated at the old firm worth, spring of 1876	$13,547 40

On page 107 are the following entries:

A. F. GAITHER.

	Dr.	Cr.
Amts. Dr. and Cr., old firm, spring 1876,	$2,544.68	$2,808.25
		2,544.68
		$ 263.57

JOHN G. COLVERT.

	Dr.	Cr.
Amts. Dr. and Cr., old firm, spring 1876,	$495.15	$1,738.25
		495.15
		$1,243.10

WM. I. COLVERT.

	Dr.	Cr.
Amts. Dr. and Cr., old firm, spring 1876,	$1,599.81	$4,072.41
		1,591.81
		$2,480.60

JOHN E. STIMPSON.

	Dr.	Cr.
Amts. Dr. and Cr., old firm, spring 1876,	$936.10	$2,022.49
		936.10
		$1,086.39

Mr. D. M. Furches, for the plaintiffs.
Mr. W. M. Robbins, for the defendants.

AVERY, J. (after stating the case). We do not deem it necessary to set forth the whole of the referee's report. We think the objection, that the testimony of the witness Colvert was not competent, under § 590 of *The Code*, should have been sustained by the referee, and the eleventh exception of the plaintiffs ought not to have been subsequently overruled by the Judge. At the end of the statement of the testimony of J. G. Colvert we find the following:

"Plaintiffs and defendant Nicholson, *in apt time, objected to all of the foregoing evidence touching any matter with A. F. Gaither.*"

It is true, that this Court has held that objections to testimony, incompetent by reason of the provisions of section

590, will not be entertained, unless they are taken in due time. If so taken they will be sustained. *Meroney* v. *Avery*, 64 N. C., 312.

The referee having found that the objection was taken in apt time, we must consider the plaintiffs' exception as having been entered, repeatedly, at the different times when Colvert testified:

"1. All of book 'A,' from pages 102 to 107, was a settlement of the old partnership, and *agreed to by all of the partners.* The agreement between the partners of the old firm was to take an aggregate of the debts and credits, and the difference between them was to be the ratio of their part, in the new firm, of the $13,547.40.

"2. The list made from pages 102 to 106 was made by Gaither and myself, we having been appointed at the first meeting in 1876 as *a committee to value the machinery*, and take a list of all notes and accounts of the old firm. Gaither and myself took the list.

"3. We (Gaither and witness) went to the factory and examined the machinery, and valued it, as the book shows. Notes were taken by Gaither, calling out the names of makers, and witness took them down in book 'A.'"

We can find other statements in the testimony of John G. Colvert that are amenable to the objection of incompetency as transactions or communications with A. F. Gaither; and objection was also made to the testimony of W. I. Colvert in the same way, some portions of his testimony being erroneously admitted; but, as there was clearly error in permitting John G. Colvert to testify that his deceased partner entered into an agreement with the witness and the other partners, that the basis of merging the business of the old firm into the new should be that the stock of members of the old firm, in that of Gaither & Colvert, should be the difference between their debits and credits with the former, and that, in pursuance of that plan of adjustment, Gaither aided him

in determining the value of partnership property, and in making the settlement recorded from page 102 to 106, book "A," and assented to the statement of the result as to each partner, on page 107 (which appears in the statement of the case). The defendant clearly had the right to testify, that book "A" was kept among the papers of Gaither & Colvert, that Gaither had access to it, and that, in fact, many of the entries in the book were in his handwriting. *Leggett* v. *Glover*, 71 N. C., 211.

But the referee was acting both as judge and jury in the trial of this case, and the appellate Court cannot determine how much weight he attached, in passing upon the facts, to the evidence of Colvert, that his deceased partner directly assented to a settlement, and aided him in recording it, when that settlement furnishes, in part, the data from which the referee reached a conclusion as to the amount due each partner at the time of the dissolution. The evidence allowed and acted upon by the referee embraced both a transaction and a communication with the deceased, when the plaintiff had brought suit for a settlement against all of the partners of their testator, and thereby placed all of them in the attitude of adversaries. This case is, therefore, distinguishable from *Peacock* v. *Stott*, 90 N. C., 518. The plaintiff in that case had brought his action against three partners, one of whom was dead, and was allowed to testify as to a transaction with the three partners, because two of them were living and could contradict him if they would not admit the truth of his statements. This testimony was held admissible because it was not within the mischief intended to be prevented by § 590 of *The Code*, viz.: "That unless both parties to the transaction can be heard on oath, a party to an action is not a competent witness" *McCanless* v. *Reynolds*, 74 N. C., 301.

The fact that plaintiffs were compelled, it may be, to select one of the defendants, W. G. Nicholson, and examine him,

as their first witness before the referee, does not affect the competency of Colvert's evidence, nor did the fact that Nicholson, one of the defendants, testified, without objection, that he heard Gaither say he had put about $2,000 into the new firm, remove the restrictions of the law, so as to make admissible evidence of Colvert, otherwise amenable to objection.

When Nicholson testified to that declaration of Gaither, the testimony of Gaither was not given in evidence, and if it had been, it did not relate to the same transaction or communication. It was not connected with the adjustment of the affairs of the old firm, the valuation of its property and the basis upon which the property was turned over to Gaither and Colvert.

But it has been held by this Court that, where there was an issue as to the existence of a partnership between a witness and the intestate of the adversary party to the action, the witness would not be allowed, after objection, to testify that such a partnership existed, without first negativing the natural supposition, that his knowledge of the existence of such a partnership was derived from a transaction or communication with the intestate. *Sikes* v. *Parker*, 95 N. C., 232.

But it has been suggested, that the plaintiffs lost the advantage of their objection to the testimony, though it was taken in apt time, as the referee reports (and we must construe apt time to mean the very earliest moment that such objection could have been made), because the referee entered the objection at the close of the testimony of the witness, instead of attaching it to the utterances of the witness, to which it was in fact directed, as incompetent. It is evident that the referee intended, desired and expected that, in fairness and good faith to the plaintiffs' counsel, the objection should be treated as specifically directed to any portions of evidence of the witness coming within the restrictions of said section. If it were not so the referee would have

omitted the words "in apt time." We cannot consent, therefore, to deprive a party of a meritorious objection, made at the proper time, and place him on a level with one who studiously waits till a witness has delivered all of his testimony, some parts of which are competent, and other portions are not, and then excepts to the whole.

This Court has refused to consider such exception, on the express ground that the Judge, if asked in apt time, might have excluded testimony specifically pointed out as incompetent, and, if search could be made for a single objectionable sentence in a mass of testimony, when silence at the moment could be construed into a waiver of objection. The "rule of practice which requires that the obnoxious evidence should be pointed out and brought to the notice of the Court, in order to a direct ruling on its reception," is just and salutary, and is established by authority. *Hammond* v. *Schiff*, 100 N. C., 161; *Barnhardt* v. *Smith*, 86 N. C., 473.

But in the case before us, the referee says that the obnoxious testimony was pointed out, and he had an opportunity of excluding it, and leaving of the "mass of testimony" only such as was competent. Obviously, the reason of the rule, adopted in the cases last cited, does not exist, and the rigorous rule itself should be held inapplicable. To hold otherwise would be to stick in the bark, and thereby do manifest injustice.

There was error in overruling the eleventh exception of the plaintiff, and the judgment is reversed. The cause will be re-referred to the referee. We have deemed it unnecessary to discuss the other exceptions. It may not be improper to call the attention of the parties to the case of *Holden* v. *Peace*, 4 Ired. Eq., 223, as bearing, possibly, upon another question that was the subject of discussion and exception.

Error. Reversed.

LUCY E. CHANCEY et al. v. E. M. POWELL et al.

Statute of Limitations—Disabilities—The Code, § 137.

1. When the statute of limitations commences to run against the ancestor or devisor, it continues to run against the heir or devisee, even though the right of action may, on the next day after it accrues, pass from the ancestor or devisor to an heir or devisee under disability.
2. Defendants entered into adverse possession of land in 1856, in the life-time of plaintiffs' ancestor, and held such possession up to the commencement of this action, in 1887. Plaintiffs' ancestor died in 1862, at which time plaintiffs were under disabilities, and they have remained under disabilities all the time: *Held*, that plaintiffs are barred by the statute. The suspension of the statute from May, 1861, to January, 1870, does not place plaintiffs on the same footing as if the statute had been *repealed* in 1861, and, therefore, only *commenced to run* in 1870, after the death of their ancestor, and while they were under disabilities; but plaintiffs stand in the same position as would their ancestor, if living.

CIVIL ACTION, tried before *Merrimon, J.*, and a jury, at the January Term, 1887, of the Superior Court of COLUMBUS County.

The facts appear in the opinion.

Messrs. D. J. Lewis and *Pearson Ellis*, for the plaintiffs.
Mr. J. Hines, for the defendants.

SHEPHERD, J. The right of action in this case accrued to D. W. Baldwin, the ancestor of the plaintiffs, in the year 1856, when the defendants, or those under whom they claim, entered into the adverse possession of the land in controversy. D. W. Baldwin lived until 1862, and was under no disability. The defendants have been in adverse possession up to the commencement of this suit, the 19th of July, 1887. Eliminating, therefore, the time from the 1st of May, 1861,

to the 1st of January, 1870, the period during which the statute of limitations and presumptions was suspended, the law would presume that the defendants were the owners of the land, and the plaintiffs would be barred. In order to meet this aspect of the case, the plaintiffs asked the Court to instruct the jury, "that if they believed from the evidence that the defendants, and those under whom they claim, took possession of the lands in controversy in 1856 or 1857, and that D. W. Baldwin, ancestor of the plaintiffs, died in 1862, and the *feme* plaintiffs were under the age of twenty-one years at the time of their father's death, and they were intermarried with the male plaintiffs before they arrived at full age, that their cause of action is not barred by the statute of limitations and presumptions."

His Honor very properly declined to give this instruction. We regard it as well settled that, "if the statute begins to run against the ancestor or devisor, it continues to run after his death, notwithstanding the infancy of the heir or devisee. There is no difference between voluntary and involuntary disabilities." Malone's Real Property Trials, 294.

PEARSON, J., in *Mebane* v. *Patrick*, 1 Jones, 23, says that, "neither the doctrine of prescription at common law nor the act of 1825 have any saving in regard to the rights of infants, *feme coverts* or persons *non compos*. In the statute of limitations, there is an express exception in favor of the rights of those who may be infants, &c., at the time the right accrues, but if, at that time, there is no disability, although the right may, on the next day, pass to an infant, &c., it is not within the proviso, so that it has grown into a legal adage, 'when the statute begins to run it continues to run.'" To the same effect are the cases of *Seawell* v. *Bunch*, 6 Jones, 195, and *Frederick* v. *Williams*, decided at this term. The cases of *Day* v. *Howard*, 73 N. C. 1, and *Clayton* v. *Rose*, 87 N. C., 106, cited by the plaintiffs, are in affirmance of the principles we have mentioned. The chief questions in *Day* v. *Howard*, *supra*,

were as to the time when the plaintiff's cause of action accrued, and how long a period of delay was required to bar the plaintiff's right of action, she being a tenant in common with the defendant. In *Clayton* v. *Rose*, it was held that inasmuch as the heirs of the trustee were infants when the cause of action accrued, the *cestui que trust* was entitled to avail herself of their disability, and her action was not barred.

The plaintiffs, however, contend: "That inasmuch as the statute of limitations was suspended at the time this cause of action accrued to the plaintiffs, the case stands upon the same footing as it would if the statute of limitations had been absolutely repealed in May, 1861, and re-enacted in January, 1870, after the death of the ancestor, D. W. Baldwin, and while the heirs-at-law were under disability."

This position finds no support, we think, in *Lippard* v. *Troutman*, 72 N. C., 551, and *Davis* v. *Perry*, 89 N. C., 420, cited by counsel.

The plaintiffs stand in the same position as would their ancestor had he lived and brought this action.

No error. Affirmed.

J. H. SCROGGS, Adm'r of A. R. SIMONTON, v. MARY M. ALEXANDER and J. H. McELWEE.

Judgment, Amendment of—Practice.

Where, in an action brought on a note given, with a surety, by a distributee of an estate to the administrator, it was adjudged that the administrator recover the amount of the note, but that no execution issue until the Clerk should determine the amount of the distributive share of the principal debtor in the estate on the final accounts of the same, and such amount should be credited before issuing of execution: *Held*, that it was competent for the Court, at a subsequent term, upon a report of the Clerk, in this action, that nothing was due on the distributive share, and there being no exception, to modify the judgment and order execution to issue, notwithstanding that in proceedings by the administrator against the distributees for a final settlement, in which there was a report of the Clerk that nothing was due on said distributive share, and an appeal from a judgment confirming the report.

This is an APPEAL, by defendant, from a judgment of *MacRae, J.*, rendered at May Term, 1886, of the Superior Court of IREDELL County, modifying judgments, theretofore rendered, and authorizing execution to issue.

The facts sufficiently appear in the opinion.

Mr. W. M. Robbins, for the plaintiff.

Messrs. Batchelor & Devereux, for the defendants.

DAVIS, J. The complaint alleged that on the 31st day of March, 1873, the defendants executed a note, under seal, for the sum of $1,297, payable to the plaintiff, as administrator with the will annexed of A. R. Simonton, deceased, and that the same had not been paid, and judgment was demanded therefor.

The answer, so far as material to the question before us, stated that the defendant M. M. Alexander was one of the

distributees of A. R. Simonton; that all his debts had been paid, and that her share in his estate would amount to more than the sum due on the note declared on, and asked judgment, that the note be paid over to her in satisfaction of her distributive share in the estate of the deceased, and that the plaintiff be enjoined from collecting it.

There was a reply admitting "that the defendant M. M. Alexander is one of the legatees under the will of A. R. Simonton, but denying that all the debts of the deceased had been paid, or that the defendants' interest in the estate would amount to as much as is due on the note, or to any considerable portion thereof.

At January Special Term, 1884, judgment was rendered in favor of the plaintiff for $2,136.80, with the further judgment, "that no execution issue upon this judgment until the Clerk of this Court shall ascertain and declare the amount of the distributive share of said Mary M. Alexander in the estate of A. R. Simonton, deceased, on final accounts of the same, and that the judgment shall be subject to a credit, before execution issues, with the amount (if any) of said distributive share."

At Spring Term, 1884, upon the suggestion of the defendants and admission of the plaintiff, that a credit had been omitted, the judgment was corrected by substituting the sum of $1,547.65 for the sum of $2,136.80, and confirmed in all other respects

At May Term, 1886, the judgment appealed from was rendered, so modifying the previous judgment as to authorize execution to issue.

The case states, among other things, "that it appears to the Court, by the report of J. B. Connelly, Clerk of this Court and referee in the case of J. H. Scroggs, Administrator, &c., of A. R. Simonton *v.* Mary M. Alexander and others, * * * that M. M. Alexander has been paid in excess of her share of A. R. Simonton's estate the sum of $211.53."

It further appears that the report of the referee referred to was made in proceedings instituted for a final account and settlement of the estate of A. R. Simonton, and that it was confirmed at the same term at which the judgment in this case was rendered, and that an appeal was taken to this Court from the judgment confirming it.

The account of the administrator, stated by the Clerk, is filed as an "exhibit" in this action, and from that account it appears that there is nothing from the "distributive share" of M. M. Alexander to be credited on the judgment in favor of the plaintiff against her; and that appearing to the Court, it properly authorized execution to issue.

But it is insisted by counsel for the defendant, that there was an appeal from the judgment confirming the report of the referee in the case of Scroggs, Administrator, &c., *v.* Mary M. Alexander and others, and that his Honor erred in authorizing execution to issue in this case before the appeal in that was determined. It is sufficient to say that "the amount of the distributive share of said Mary M. Alexander in the estate of said A. R. Simonton, deceased," was ascertained and declared *in this action* upon the report of the Clerk, and there was no exception taken thereto. The fact that the report of the referee in the case of Scroggs, Administrator, &c., *v.* Mary M. Alexander and others, though the same as that upon which the action of the Court in this case was based, was appealed from (upon what grounds this case does not disclose), cannot be considered by us in this appeal, though it may not be improper to say that the judgment of the Court below was affirmed in that, as it must be in this case. See *Scroggs* v. *Stevenson* (Alexander), 100 N. C., 354.

No error. Affirmed.

E. S. JAFFRAY & CO. v. SOL. BEAR & BRO.*

Statute of Limitations—The Code, § 155 (9)

1. Subsection 9, § 155, of *The Code*, applies to actions *solely cognizable* in the courts of equity, under the practice prior to C. C. P. It does not apply to actions of which the courts of law and equity had concurrent jurisdiction.
2. A receipt in full, obtained by a debtor from his creditor by fraud, could have been nullified in an action at law, under the old practice, by a plea and proof of fraud in obtaining it.
3. Therefore, where a debtor obtained a receipt in full from his creditor, upon paying only twenty-five per cent. of the debt, by fraudulent representations, and the creditor sued for the residue of his claim more than three years after his cause of action accrued, but within three years after discovery of the fraud: *Held*, that his action was barred by the statute of limitations.
4. The act of 1889, amending § 155 (9) of *The Code*, does not apply to this case.

CIVIL ACTION, tried before *Shepherd*, *J.*, and a jury, at April Term, 1888, of NEW HANOVER Superior Court.

The questions to be decided are sufficiently presented by the case stated on appeal, and the following is a copy of so much thereof as need be reported here:

"In the month of October, 1881, the defendants became indebted to the plaintiffs in the sum of thirty-two hundred and six dollars and fifty-three cents ($3,206.53) for goods sold and delivered. On the 19th of November, 1881, the defendants made a deed of assignment of all their real and personal estate to one Fernberger, in trust for the payment of their creditors, with certain preferred classes, the plaintiffs not being among the preferred creditors. On the 5th July, 1882, after some negotiations, the plaintiffs, through their attorney, agreed with defendants to compromise and settle their claim at twenty-five cents in the dollar, and on that

*SHEPHERD, J., did not sit in this case.

day the money was paid to said attorney, and he signed a simple receipt in full, for the debt of the plaintiffs, on the face of the account for the goods which they had rendered to defendants. This action was commenced on the 13th December, 1886.

"There was evidence tending to show that some of the preferred debts in the deed of assignment were fictitious, and that plaintiffs were induced to assent to the compromise by the false and fraudulent representations of defendants that all of the preferred debts were honest and *bona fide*, and that plaintiffs did not discover that those representations were false, and that some of the preferred debts were fictitious, until within three years before the commencement of this action.

"His Honor intimated his opinion that this case was not heretofore solely cognizable by the courts of equity, but there was a concurrent jurisdiction at law, and, therefore, the case was not within the saving of *The Code*, § 155, subdivision 9, and the action was barred by the statute of limitations. In deference to this intimation, the plaintiff took a nonsuit, and appealed."

Messrs. E. C. Smith and *T. W. Strange*, for the plaintiffs.
Mr. George Davis, for the defendant.

MERRIMON, J. (after stating the case). The cause of action alleged in the complaint is clearly barred by the statute of limitations (*The Code*, § 155, par. 1), if the latter, as contended by the defendants, is applicable in this case. The plaintiffs contend, however, that it is not pertinent; that the ninth paragraph of the same section is—that it embraces and applies to the present and all like causes of action, and, therefore, their present cause of action is not barred, the action having been brought within three years next after the discovery of the alleged fraud.

The bar of three years applies to the class of cases specified in the ninth paragraph mentioned. It prescribes that, "an action for relief on the ground of fraud or mistake, in cases which heretofore were *solely cognizable* by courts of equity, the cause of action in such cases not to be deemed to have accrued until *the discovery* by the aggrieved party of the facts constituting such fraud or mistake." It will be observed that this paragraph applies only to causes of action founded on the ground of fraud or mistake, *solely* cognizable by courts of equity, prior to its enactment. Whatever may have been the legislative motive for such restrictive application, it plainly exists, and the courts must give it effect. Prior to the enactment of the present method of Code procedure in this State, including the statutory provisions just cited, there prevailed therein a settled and well-understood distinction between causes of litigation of which courts of equity have sole and exclusive jurisdiction, and also such as they had jurisdiction of concurrently with the Superior Courts, as distinguised from them. Of the former class, these were such as were founded on fraud and mistake, and to these the paragraph of the statute above recited clearly applies; it does not, however, apply to cases as to which such courts had concurrent jurisdiction. This is the plain implication from the statute, and, moreover, this Court has so decided in repeated cases. In *Blount* v. *Parker*, 78 N. C., 128, it is said, that "the act, however, may be regarded as a legislative declaration that the effect of the statute cannot be defeated, even in case of undiscovered fraud, unless the fraud is such that the jurisdiction of a court of equity was alone competent to afford relief." It was also said in *Egerton* v. *Logan*, 81 N. C., 172, that, "if the express trust alleged to arise out of the vague and indefinite words used by the defendant at the time of the transfer was not determined by the first demand, and the antagonistic relations thereby produced, it is nevertheless manifest that there are concurrent remedies at law and

in equity, and hence the case does not come within the saving of the statute." *Spruill* v. *Sanderson*, 79 N. C., 466, is to the like effect.

Granting that in some aspects of the plaintiffs' alleged cause of action, it was formerly cognizable in a court of equity, it certainly was not exclusively so—a court of law had concurrent jurisdiction. Accepting the evidence produced on the trial as true, in connection with the pleadings, as we must for the present purpose, the defendants owed the plaintiffs simply a sum of money specified for goods, and the former fraudulently, and by false and fraudulent representations and inducements, led the latter to receive twenty-five *per centum* of the debt so due them in discharge of the whole thereof, and to execute a receipt proper as to form for the whole. But this did not conclude the plaintiffs at law—they might, notwithstanding such payment and receipt, have maintained an action at law to recover their debt, less the payment, because the transaction, including the receipt adverse to them, was fraudulent, and the plaintiffs might have treated it as void, and such fraud appearing on the trial, the Court would have allowed them to recover judgment for the debt. Fraud vitiates and renders void and nugatory such like receipts and acquittances, so that they cannot, when properly objected to, be successfully interposed and stand in the way of a recovery at law. It has such effect in cases like this, both in law and equity. Story on Conts., § 495; Chit. on Conts., 590; Broom's Phil. Law, 42 *et seq.;* 1 Chit. on Pl., 581, 584; 1 Saunders on Pl. and Ev., 823; *Elliott* v. *Logan*, Phil. Eq., 163; *Wilson* v. *White*, 80 N. C., 280; *Edgerton* v. *Logan*, 81 N. C., 172; *Hampton* v. *Cohen*, 73 Ill., 303.

As, therefore, the plaintiffs' cause of action was cognizable, both in courts of law and equity, it is barred by the statute of limitations first above cited.

The learned counsel for the plaintiffs contended on the argument, that, accepting the evidence as true, the defend-

ants had perpetrated a gross fraud upon them, which they had not been able to discover until the statutory bar had become effectual against them, and that the Court ought, in the exercise of its equitable authority, to prevent the defendants from taking advantage of the bar at law, upon the ground that it would be manifestly inequitable and unjust to allow them to take and have advantage of their own fraud, to the grievous prejudice of the plaintiffs, and they cited and relied upon the rule of equity invoked as stated in Story's Eq. Jur., secs. 1521, 1521a, and *Kirby* v. *Lake Shore, &c., Railroad Co.*, 120 U. S., 130.

This contention would have great force but for the statutory provisions already cited and applied. In this State the principles both of law and equity are applied now in and by the same court, in the same action, and the same cause of action, when need be, and it seems to us clear that the purpose, in part, of the statute, was to prevent the exercise of the power invoked in cases like the present one. It prescribes in plain terms the classes of cases in which the cause of action shall not be deemed to have accrued until the fraud shall be discovered. Why is the restriction made to apply to one class of cases and not to others? It was intended to serve some purpose—that indicated in the paragraph cited. If it had been contemplated that the courts should exercise the power as formerly, then this paragraph was unnecessary and would serve no useful purpose, because the courts could interpose their power, as justice and occasion might require, just as before the present statute of limitations and method of procedure began to prevail.

In the case last cited, the learned Judge adverts to the similar restrictions upon the courts of the State of New York, whose statute is substantially—almost literally—like that of this State to which we refer above. The Courts of Equity of the United States are not troubled by such restrictions, nor, it seems, are they generally affected, if at all, by the practice

of the courts of the several States in administering the principles of equity. Their jurisdiction is the same as that of the High Court of Chancery in England, subject neither to limitation nor restraint by State legislation, and it is the same and uniform throughout the States of the Union. Hence, the United States Court could, in the case cited, exercise the authority and grant relief that we are constrained to deny.

The counsel of the plaintiffs bring to our attention an act passed by the General Assembly at its late session, which simply strikes out of the paragraph above recited, of the section of the statute cited, the words, "in cases which heretofore were solely cognizable by courts of equity." This act has no application, by its terms or effect, to this appeal.

No question is raised in the record by it, nor has the action in any aspect of it been directed or tried with a view to it, or its effect upon the subject-matter of the action.

No error. Affirmed.

HENRY TUCKER v. FLORA TUCKER.*

Homestead—Widow.

A homestead, whether laid off to a husband in his life-time, or to his widow (there being no children), after his death, cannot be divested in favor of the heir by the release or extinguishment of the deceased husband's debts.

This action was commenced in the Superior Court of NEW HANOVER County, to have the defendant's dower allotted to her in the land mentioned in the pleadings, and heard, upon

*SHEPHERD, J., did not sit in this case.

appeal from the Clerk, at Spring Term, 1888, before *Shepherd, J.*, upon the following facts, found as a special verdict:

"William Tucker, the husband of the defendant, died seized and possessed of the property in controversy, leaving the defendant as his widow, and the plaintiff as his only heir-at-law, said plaintiff being an adult brother; and that said William Tucker died in the year 1880; that at the date of his death, said William Tucker left some debts, but that said debts have been since paid by the plaintiff, in the year 1887; that in the year 1880, while said debts were existing, defendant had her homestead laid off and allotted according to law; that the personal property was exhausted in the payment of the debts, and was insufficient to pay them, and the final account of said Flora (defendant), as administrator (administratrix), who was duly qualified as such, was filed and approved on February 1, 1882."

Upon these facts, his Honor adjudged that the plaintiff was not entitled to the relief demanded, and that the defendant was entitled to the homestead which had been set apart to her.

From this judgment the plaintiff appealed.

Mr. J. D. Bellamy, for the plaintiff.
Mr. Thomas H. Strange, for the defendant.

DAVIS, J. It is said for the plaintiff, that if the husband dies, leaving no debts and no children, the widow will not be entitled to a homestead, but only to dower, and it is insisted that, this being so, the homestead is conferred simply as a protection against creditors, and that if the homestead has been assigned, and the heir, representing the deceased debtor, pays off the debts, there will no longer be a necessity for the continuance of the homestead estate, and the heir will become entitled to the land, subject only to the

widow's right of dower; and for this position *Hoger* v. *Nixon*, 69 N. C., 108, is cited. It is there said, that where no homestead was laid off in the life-time of the husband, it may be laid off as a protection against creditors, but is valid and available against them only. "As between the widow and the heirs, the estate goes under the general law," and there is a *quære* as to what would be the result, if the heir should procure the creditor to release and extinguish the debt, which seems to have been done in the present case.

It appears, from the statement of facts agreed, that there were debts, and that the homestead was allotted to the widow (defendant) according to law, and the allotment or assignment was void. *Smith* v. *McDonald*, 95 N. C., 163, and cases there cited.

We are clearly of the opinion that the homestead, whether laid off to the husband in his life-time, or, when he leaves no children, to his widow, after his death, cannot be divested in favor of the heir by the release or extinguishment of the debts of the deceased husband, but it shall inure to the benefit of the widow "during her widowhood." Constitution, Art. X, § 5; *The Code*, § 514.

No error. Affirmed.

W. W. BROWN et al. v. ELIZABETH WARD et al.*

Deed, Construction of—The Code, § 1326, *Election.*

1. A deed of gift, executed in 1790 by W. B. to his son J. B., "during his natural life only, and then to return to the male children of said J. B., lawfully begotten of his body, for the want of such to return to the male children of my other sons W. and B., their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," with covenants, &c., vested a life estate in J. B., with remainder in fee to his sons as tenants in common under the act of 1784 (*The Code*, § 1326).

2. J. B., being such life tenant, devised the lands, with parts of other tracts he owned, to his wife for life, and then to P. B., one of his seven sons, to be by him "enjoyed during his natural life, without impeachment of waste," and after his death "to the children of my son who may be living at his death, to them and their heirs" *per stirpes*, and P. B. and his mother having taken possession of the lands, conveyed by deed of bargain and sale the land in dispute, with others, to one B. B. in fee with warranty: *Held*, in an action by the children of P. B. against the defendants, who were in possession and claimed through the deed to B. B., that the plaintiffs were entitled to recover.

3. P. B. having *elected* to take under the will of his father J. B. the full estate for his own life, in the land to which he was entitled to a fractional interest only under the deed of his grandfather, W. B., could not repudiate the will of J. B. in so far as it gave the remainder after his death to his surviving children.

4. When one disposes by will of the absolute right in property in which he has a limited interest only, he necessarily shows an intention to extinguish all other conflicting adverse rights, whether vested or contingent.

CIVIL ACTION, for recovery of land, tried before *Shepherd, J.*, at Spring Term, 1888, of the Superior Court of CARTERET.

William Borden being the owner in fee of the tract of land described in the complaint, the possession whereof is

*SHEPHERD, J., did not sit in this case.

demanded in the action, on the 1st day of May, 1790, by deed of gift, conveyed the same, with the other lands, to his son Joseph Borden, Sr, "during his natural life only, and then to return to the male children of the said Joseph Borden, lawfully begotten of his body," with further limitations contingent upon his having such.

The donee for life entered accordingly into possession of the said tract, and held the same until his death in 1825. Two years previous thereto, he made a will, sufficient in form to pass both real and personal estate, which was admitted to probate at March Term, 1825, of the county Court of Carteret. The testator has acquired a large landed estate in Carteret and Hyde counties, besides that obtained under the deed of his father, which he devises in distributive parts, as well as personally, among his children, of whom were living, at the time of his decease, seven sons, William Hall, Thomas R., David W., James W., Joseph J., Benjamin and Isaac Pennington Borden, and a daughter, Mary. His wife Esther also survived him. In one of the clauses of the will the testator devises to his son, Pennington Borden, with other real estate mentioned, to use his own words, "the plantation where I live, between Harlow's Creek and the water fence at Pagnanet's Landing, on New Port River, and running with the fence and boundary described, to my son Joseph, that part next to said creek," this being, as we understand the case agreed, the territory in dispute, which, in the first dispositive clause, is given to his wife Esther for her use during life, and in the latter clause to said Pennington, qualified by the words: "To be by my said son Pennington enjoyed during his natural life, without any impeachment of waste, and after the death of my said son Pennington Borden, *I give the same to the children of my son who may be living at his death* to them and their heirs forever, and if any of the children of my said son should die in his lifetime, having children, such children shall take the share of

lands to which their father or mother would have been entitled, had they have lived, with one ninth of my movable estate."

Pennington Borden and Esther took possession of the lands devised to them in manner aforesaid, and by their deed, bearing date the 25th day of September, 1835, for the recited consideration of $2,500, sold and conveyed the disputed portion of the devised lands and some others to Benjamin Borden, Sr., and his heirs, with warranty of title in fee.

Pennington Borden died intestate on the 25th day of December, 1878, leaving three children, William W. Borden, Emma H. Borden and Anna F. Gewin, who, as plaintiffs, prosecute the present action. Esther, the widow, died on August 19, 1853.

The defendants claim title under the deed to Benjamin Borden, Sr., who, at his death, devised the land to Benjamin F. Borden, by whose deed, dated in 1843, it was conveyed to Rufus Ward, and descended, at the death of the latter, to the defendants, in whose possession, successively, it has been since the execution of the deed of Pennington and Esther in September, 1835.

The present action was begun by the issue of a summons, on October 14, 1884, not quite six years after the death of said Pennington and the vesting in possession of the plaintiffs' claimed estate in remainder, under the will of said Joseph Borden, Sr. The value of the annual rent is, by agreement, fixed at $15, and the foregoing statement of facts is submitted to the Court for an adjudication of the title, to the end that if it rules in favor of the plaintiffs, judgment shall be entered for the recovery thereof, and for damages ascertained as aforesaid, from a period beginning three years before suit, and extending to the trial; and if for the defendants, judgment of nonsuit shall be entered. The Court being of opinion that the plaintiffs were entitled to the

premises, gave judgment accordingly, and the defendants appealed.

No counsel for the plaintiffs.

Messrs. C. R. Thomas, Jr., and *C. M Busbee*, for the defendants.

SMITH, C. J. (after stating the facts). The construction and operation of a deed executed at the same date and by the same original owner, William Borden, Sr., to another son of the donor, bearing his name, and conveying, by gift, other lands, with essentially similar limitations as that now before us, came before this Court for determination in *Borden* v. *Thomas*, 6 Ired., 209. The lessor, the son William, donee of a life estate, conveyed the land, as if the owner of an estate in fee, to James Porter, from whom the defendants deduced their title. The lessor was the only son of the donee, William Borden, Jr. The Court held, DANIEL, Judge, delivering the opinion, that the said William had but an estate during his life, and the estate in remainder vested in his only son, who brought the action in fee, and that he was entitled to recover, the warranty having no other effect than as a covenant, under § 8, ch. 43 of the Revised Statutes, now found in *The Code*, § 1334. The words of inheritance which follow the last limitation to the male children of the sons of Benjamin and Joseph being equally applicable to the male children of said William, enlarged his remainder also into a fee.

The decision determines an interpretation of the deed before us, which gives a life estate only to the said Joseph Borden, Jr., and the estate in remainder, after its termination in fee, to his seven sons as tenants in common, under the act of 1784 (*The Code*, § 1326), the said Pennington being entitled to an undivided seventh part thereof.

The cases are similar in that the life tenants undertake, the one by deed, the other by will, to convey the absolute property in the respective tracts, while they are unlike in that the estate in remainder, in that cited, vested in one, and in our case in several; but the principle involved is common to both, and each endeavored to dispose of land, as his own, when he had but a limited estate in it.

It is true the testator Joseph devises, in terms, a full estate for life, subject to his widow's life estate, to a devisee who had an undivided share therein under his grandfather's deed, but if accepted and acquiesced in by the other tenants, it was a different and enlarged estate, except in duration and time of possession, from that which he could have claimed under the deed had he refused the provisions made for his benefit by the will.

It is a rule of general application that one cannot claim under and against a written instrument, if it undertakes to dispose of his property to others, and gives him property which he would not otherwise have; if he takes the latter, he must surrender his own. This is called an election, and most frequently in testamentary dispositions one is called on to make it, or by his acts is held to have made it, and binds himself thereby.

"It is sufficient to raise a case of election," says STORY, J., "that the testator does dispose of property which is not his own, without any inquiry whether he did so knowing it not to be his own, or whether he did so under the erroneous supposition that it was his own. *If the property was known not to be his own, it would be a clear case of election.*" 2 Eq. Jur., sec. 1093.

Again: "It may be added, that when a party, by his will, disposes of the absolute right in property, in which he has a limited interest only, *he necessarily shows an intention to extinguish all other conflicting adverse rights*, whether they are pres-

ent or future, vested or contingent, and consequently it must be wholly unimportant whether the interests so extinguished are great or small, immediate or remote, valuable or trifling." *Ibid.*, sec. 1096.

In the same direction are our own adjudications—*Sigmon* v. *Hawn*, 87 N. C., 450; *Isler* v. *Isler*, 88 N. C., 576.

The principle, enunciated clearly, takes in the facts of the present case, which show an election to have been made. The testator had full knowledge that his own estate expired with his life, and that he had no further control of the property, which then passed to his sons. Treating it as his own, he makes a distribution of it, with his own large estate, among his children, in a manner he seems to have considered just and fair, and which they seem to have acquiesced in and left undisturbed—the other six, whose shares he gives to Pennington and his mother, making no resistance thereto, content to keep what the will gives them. Pennington, acting in a similar manner, sharing with his mother the full estate for his own life in the land, of which he had a fractional interest only, recognizing the title derived under the will, in selling and conveying the land, with warranty, to the before-named vendee, surely he cannot now be allowed to repudiate the will in so much of it as gives the remainder, after his death, to the plaintiffs, his surviving children. It is manifest that he, as well as the others, so far as appears, has accepted the beneficiary provisions of the will, and, in doing so, surrendered any right under the deed of his grandfather inconsistent therewith, and must, as must those claiming under his deed to Benjamin Borden, abide by his election and take the estate given in the will.

Then, at Pennington's death, terminated his estate in the land, and the remainder vested in possession in the plaintiffs.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

F. D. KOONCE, Adm'r of ANN KOONCE, v. OLIVIA RUSSELL, Adm'x, et al.

Compromise—Contracts, Existing Laws Deemed Part of—Const. U. S., Art. I, § 10—*The Code,* § 574.

1. The payment and acceptance of a less sum than is actually due, in compromise of the whole debt, is a complete and valid discharge, under *The Code*, § 574. And this is so, although the debt compromised was one contracted and reduced to judgment before § 574 became the law, if the compromise was made after § 574 was enacted.
2. As, under § 574, the payment of a less sum where a greater is due, is not a discharge, unless voluntarily accepted as a compromise by the creditor, the section is not in conflict with Art. I, § 10, Const. U. S., in its application to pre-existing contracts.
3. Laws existing at the date of a contract are deemed part of the contract. Therefore, a compromise, made since § 574 was enacted, is construed as if § 574 had been incorporated in its terms.

CIVIL ACTION, tried before *Shepherd, J.*, at Fall Term, 1888, of ONSLOW Superior Court.

This was a motion in an original cause, being a special proceeding, instituted by the creditors of Daniel L. Russell, deceased, against the defendants, Bellamy and Russell, his executors, formerly acting, and the defendant Olivia, who is now administratrix *cum testamento annexo* of said Daniel L. Russell The motion was heard before Shepherd, Judge, at the Fall Term, 1888, of the Superior Court of Onslow County. The plaintiff's intestate, Mrs. Anna Koonce, died in the year 1877, but, before her death, she had recovered two judgments against the said executors of Daniel L. Russell—the first for the sum of $811.82, at the Fall Term, 1871, of Onslow Superior Court, and the second for the sum of $852.74, at the Spring Term, 1873, of said Court.

As one of the creditors of Daniel L. Russell, deceased, the said Anna Koonce made herself a party to a special proceed-

ing instituted by his creditors in the year 1879, and proved and filed said judgments rendered against the executors, and the special proceeding is still pending. In October, 1885, Daniel L. Russell, the defendant, acting as the agent of the executor or administratrix of Daniel L. Russell, deceased, offered the sum of $1,000 by way of compromise of the two judgments, then amounting in the aggregate to $1,492.29; and said agent further offered to pay the costs that had accrued in said special proceeding, and also in the two actions wherein plaintiff's intestate had recovered said judgments against the executors of Daniel L. Russell. The plaintiff accepted the offer, and gave the personal representative of Daniel Russell, deceased, a receipt in full for the whole amount of the judgment. The costs in said suits, and in the special proceeding, have not been paid.

The motion was for a judgment in favor of plaintiff for the balance due the estate of his intestate on the above-mentioned judgments, after deducting the $1,000 paid as a compromise.

This motion was refused. Thereupon, plaintiff excepted and appealed.

Mr. S. W. Isler, for the plaintiff.

No counsel for the defendants.

AVERY, J. The plaintiff's counsel presented and relied upon the single point, for which he had contended in the Court below, that plaintiff was entitled to recover the sum of four hundred and ninety-two dollars and twenty cents, being the difference between the aggregate amount due on the two judgments and the amount actually paid by the administratrix Olivia Russell, through her agent, in compromise for the whole.

If the compromise had been made prior to the passage of the act of 1874–'75 (Laws of 1874–'75, ch. 178, § 1, *The Code*,

§ 574), the payment of one thousand dollars would not have discharged the debt, but would have been valid only *pro tanto*, leaving to the plaintiff the right to collect the difference between the sum paid and that actually due, as he seeks to do in this action, because the agreement to receive a part for the whole was held to be a *nudum factum* as to all in excess of the sum actually paid. *Currie* v. *Kennedy*, 78 N. C., 91; *Hayes* v. *Davidson*, 70 N. C., 573; *Mitchell* v. *Sawyer*, 71 N. C., 70; *Love* v. *Johnston*, 72 N. C., 415.

The contract, to accept one thousand dollars as a payment in full of both judgments, was made, however, in October, 1885, and when the statute (*The Code*, § 574) was and had been for many years the law of the land. But the plaintiff's counsel contends, that the last named act could not be construed to apply to a debt, upon which the plaintiff's intestate recovered judgment before it was enacted, because it would be a violation of sec. 10, Art. I, of the Constitution of the United States, to give to the law a retroactive effect, and he relies upon the case of *Edwards* v. *Kearzey*, 96 U. S., 595, to sustain the position. The parties contracted as to payment with reference to the law in force, when the contract was made, and, if such a receipt had been deemed a *nudum factum*, under the law then existing, as to any part of the debt, a subsequent act could not have supplied the want of consideration. But the compromise must be considered, just as though the statute (*The Code*, § 574) had been incorporated into the receipt given by the plaintiff.

"The obligation of a contract consists in its binding force on the party who makes it. This depends upon the law in existence when it is made. These are necessarily referred to in all contracts, and form a part of them, as the measure of the obligation to perform them by the one party, and the right acquired by the other." Cooley's Cons. Lim., p. 285.

A law providing that, if creditors, in the exercise of their

own judgment, voluntarily accept a part of a debt already in existence in discharge of the whole, cannot be held to impair the obligation of the original contract. *Grant* v. *Hughes*, 96 N. C., 177; *Fickey* v. *Merrimon*, 79 N. C., 585.

No error. Affirmed.

ADRIAN & VOLLERS v. McCASKILL & McLEAN.

Negotiable Paper—Liability of Indorsers between Themselves—Blank Indorsements, Oral Evidence to Explain.

1. One who obtains possession of a negotiable paper, after indorsing it, is restored to his original position, and cannot hold intermediate parties who could look to him. It is equally true that one who derives possession of the paper from him, with notice of this fact, cannot hold such intermediate indorsers liable; and when such indorsements are in *blank*, oral testimony is admissible to show the relation in which they stand.
2. The construction placed upon *The Code*, § 177, by *Harris* v. *Burwell* and *Martin* v. *Richardson*, is confined to the makers of promissory notes, and does not apply as between indorsers.
3. The payee in a negotiable note indorsed it in blank and delivered it, before maturity, to McC. as a collateral. McC. also indorsed the note in blank before maturity, and delivered it to W. & Co. as collateral. McC. redeemed and took up the note from W. & Co., before its maturity, and continued to hold it until *after its maturity*, when he returned it to the payee without erasing his (McC.'s) name as indorser. The *payee* then sold the note to plaintiffs for value. Plaintiffs had no actual notice of the former dealing and transactions connected with the note: *Held*, (1) that as plaintiffs derived their title directly from the original payee, who had reacquired title, they could not hold the indorser McC.; (2) that plaintiffs were affected with, and bound by, notice of what appeared on the note itself, to-wit, that the person from whom they purchased was the payee and first indorser; (3) that the indorsement of McC., although in blank, could not have been

filled up by plaintiffs with their own names, because, having purchased the note from the payee, whose indorsement was *prior* to McC.'s, it would have been a gross wrong, if not a fraud, upon McC.; (4) that plaintiffs could not hold McC. as an accommodation indorser or guarantor, because, having purchased the note after maturity, and with notice of its dishonor, the facts which discharged McC. could be set up as a defence.

CIVIL ACTION, tried before *Shipp, J.*, at January Term, 1889, of the Superior Court of NEW HANOVER County.

The following is a statement of the facts agreed upon by the parties:

On the 10th day of January, 1884, one Mary J. Fairly executed her promissory note in writing, under seal, a copy of which said note and the endorsements thereon is as follows, to-wit:

"$1,386.65. "LAURINBURG, N. C., Jan. 10, 1884.

"On or before the first day of November next I promise to pay to W. C. Patterson, or order, the sum of one thousand three hundred and eighty-six dollars and sixty-five cents for value received. This note to bear interest at the rate of ten per cent. after maturity.

"January 10, A. D. 1884.

"Payable at the office of McCaskill & McL.

"MARY J. FAIRLY." [Seal.]

Upon which were the following indorsements, to-wit:

"W. C. PATTERSON,

"MCCASKILL & MCLEAN."

"Received on the within note forty-five dollars and ninety-seven cents. W. C. PATTERSON.

"January 14, 1885."

That afterwards, in the month of January, 1885, and after the maturity of the said note, plaintiffs became the pur-

chasers for value of the said note, from the said W. C. Patterson, indorsed as above set forth, without any actual notice whatever of any of the equities or defences set up in the answer of the defendants, who were sued as indorsers.

It is admitted that the following facts are true: That early in the year 1884, the defendants agreed with W. C. Patterson, the payee named in the note described in article two of the complaint (and set forth above), to make advancements to him in money and goods during said year, to enable him to cultivate his farm during said year, and to secure the defendants for such advancements as they might make to him, said Patterson indorsed the said note in blank and delivered it to the defendants in February, 1884, to be held by the defendants as collateral security for such sum or sums of money as he (Patterson) might owe the defendants at the end of 1884; and that on the 23d day of February, 1884, the defendants indorsed said note in blank, and, with the knowledge and consent of said Patterson, delivered the same to Geo. W. Williams & Co., of Wilmington, N. C., to be held by said Geo. W. Williams & Co. as collateral security for money loaned to the defendants in 1884, and that the indorsement on said note by the defendants was solely to secure said Geo W. Williams & Co., as above stated; that on the 15th of October, 1884, the defendants paid the said Geo. W. Williams & Co. the money borrowed of them as above stated, and the said Geo. W. Williams & Co. returned the aforesaid note at the same time to the defendants; that the defendants held the said note thereafter as collateral security, as aforesaid, until the 5th day of December, 1884, when they returned said note to the said W. C. Patterson, they being satisfied to trust him for the balance then due them without said collateral security, and, at the time the defendants returned said note to the said Patterson, they, by accident, oversight and mistake, failed to erase their

names as indorsers on said note; that at the time said note was returned to said W. C. Patterson, it was well known to him that they were not liable as indorsers on said note, and they believe he well knew that they failed and omitted to erase their names through accident, oversight and mistake, and that it was well known to the said W. C. Patterson at the time the defendants returned aforesaid note to him, on the 5th of December, 1884, that the names of the defendants, as indorsers in blank, were not there for his accommodation, and that he well knew he had no legal or moral right to use their names as such, and that he well knew he had no right to deliver said note to plaintiffs with the indorsement of the defendants in blank on the same.

The plaintiffs objected to the introduction in evidence of the said facts set up by the defendants, and insisted that, as it was admitted (as hereinbefore stated) that they had no actual notice of them, that the evidence of said facts was not competent or admissible against them. His Honor held that the evidence was competent, and thereupon gave judgment for the defendants as set forth in the record of this action. From this judgment the plaintiffs appealed.

Mr. E. S. Martin, for the plaintiffs.
Mr. Jno. D. Shaw, for the defendants.

DAVIS, J. (after stating the case). The note is dated January 10, 1884, and is payable to "W. C. Patterson or order," on the 1st day of November. It is indorsed by the payee and by the defendants, the name of the payee appearing as first in order. On the 25th day of January, 1885, more than twelve months after its date, and long after its maturity, the plaintiffs became the purchasers from the payee, with the indorsement as set forth.

Were the facts, admitted to be true, admissible to explain the character and nature of the indorsement of the defendants?

The plaintiffs say that, as they had no actual notice of "any such equities of defence," and were purchasers for value, the evidence was not competent as against them.

By statute, promissory notes, whether with or without seal, are made assignable, "in like manner as inland bills of exchange are by custom of merchants in England." They are, in the language of the mercantile law, 'negotiable," and may be transferred and negotiated, free from any equities which exist between the original parties to them. "Each indorser, including the payee, down the line, has and passes the legal title, and his indorsement in legal import is a contract with his indorsee, and all subsequent holders by indorsement, that the maker will pay the note, or * * * he will." *Hill* v. *Shields*, 81 N. C., 250, and the cases there cited, and innumerable decisions, English and American, cited in Parsons, Daniel, Randolph and other elementary writers upon the subject, indicate the solicitude of courts to protect *bona fide* purchasers and innocent holders of negotiable paper, so essential to commerce and trade; and the construction placed upon sec. 177 of *The Code* (C. C. P., § 55), in *Harris* v. *Burwell*, 65 N. C., 584, and *Martin* v. *Richardson*, 68 N. C., 255, has been limited to the makers of promissory notes, &c., and held not to apply as between indorsers.

Conceding the importance of protecting *bona fide* holders of commercial paper "in its unchecked circulation," what are the liabilities of the defendants in the present case? That the holder of a negotiable note is presumed to be the owner admits of no question, and that, after such a note is put in circulation, indorsers are liable in the order of succession, is equally clear, if the indorsement be not limited or qualified. No prior indorser can look to any subsequent indorser. "One who obtains possession of a bill or note, after indorsing it, is restored to his original position, and cannot, of course, hold intermediate parties, who could look to him again." 2 Ran. Com. Pa. S., 719. It must be

equally clear that one who derives possession from him, with notice of this fact, cannot hold such intermediate indorsers liable, and, when such indorsements are in *blank*, parol testimony is admissible to show the relation in which they stand. *Ibid.*, §§ 778, 841 and 883.

When the note was returned to Patterson, he became again the owner, and, as between him and any subsequent indorsers, the relation of indorser and indorsee ceased. The plaintiffs were not the indorsers of the defendants. It is clear that Patterson could not, by reason of the blank indorsement of McCaskill & McLean, hold them liable for the note, for he stood in the relation to them of a prior indorser. The plaintiffs derived their title directly from Patterson, the original payee, who had re-acquired the title, and not as successive indorsers, deriving title through the indorsement of the defendant; and this distinguished this case from *Hill* v. *Shields*, *supra*; *Parker* v. *Stallings*, Phil., 590, and similar cases.

The plaintiffs were affected with, and bound by, notice of what appeared upon the note itself, and they took the note from the original payee, bearing upon its face the fact that he was the first indorser, and that the defendants were his indorsees.

An indorsement in *blank* by the payee is presumed to have been intended as a transfer, and, though this may be rebutted by parol proof (*Davis* v. *Morgan*, 64 N. C., 570), the admitted facts in this case show that the indorsement by the payee was in accord with the *presumption*—a transfer to McCaskill & McLean.

But it is insisted that, as between the indorsers in blank, the holder may fill the blank by making it payable to himself, or to any one he may choose. This is so, where he obtains the note, not from the payee or a prior indorser, but holds it as a *bona fide* purchaser, without any knowledge or notice of the relation sustained by prior indorsers to the note. In the present case, if the plaintiffs, purchasing the note,

not from the defendants, but from the prior indorsing payee, had filled the blank indorsement of McCaskill & McLean to themselves, it would not have been in accordance with what they knew the fact to be, and would have been a gross wrong, if not fraud, upon the defendants.

The plaintiffs further rely upon the well-settled rule "that whenever one or two innocent persons must suffer loss by the acts of the third, he who, by his negligent conduct, made it possible for loss to occur, must bear the loss, for it is against reason that an innocent party should suffer for the negligent conduct of another," and that the defendants, by neglecting to erase their indorsement, "*induced* the plaintiffs to rely on the legal import of the indorsement, *and ought not to be allowed*, against the plaintiffs, purchasers for value and without notice, to make proof of the alleged facts."

Though the plaintiffs had no "actual notice," we have already seen that they were charged, in law, with notice of facts apparent upon the face of the paper which they purchased from Patterson.

But the defendants may have been indorsers for *accommodation*, or as *sureties* or *guarantors*. True; and the indorsement of a note by a third person, made at the time of its execution, binds him, according to the intention of the parties, either as joint principal or as surety. *Baker* v. *Robinson*, 63 N. C., 191.

If the plaintiffs looked to the defendants as accommodation indorsers, or as guarantors, then, as they purchased the note from the payee *after* maturity, they were not "*bona fide* holders before maturity," but had notice, as appeared upon the face of the paper, of its dishonor. Rev. Com. Paper, sec. 672; *Bank* v. *Lutterloh*, 95 N. C., 495; *Chaddock* v. *Vanness*, 35 N. J., 517.

So, whether by the one way or the other, the plaintiffs cannot hold the defendants liable.

No error. Affirmed.

MATTIE F. FREDERICK et al. v. HARPER WILLIAMS.

Statute of Limitations, as to Suit to Redeem Mortgage: When not Arrested by Disabilities; The Code, §§ 152 (4), 148, 168—*Mortgagee in Possession.*

1. If the statute of limitations commences to run, nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast.
2. There is nothing in § 148, *The Code*, which changes the law as it formerly existed.
3. Mortgagee sold the mortgaged land, bought it himself, and entered into adverse possession in the life-time of mortgagor, *i. e.*, on January 1, 1874; which adverse possession has continued ever since. Mortgagor died January 1, 1883; there has never been any administration on his estate; in June, 1887, his *infant* heirs sued the mortgagee for redemption: *Held*, that the action is barred under *The Code*, §§ 152 (4), 148 and 168.
4. Where a mortgagee takes adverse possession of, and rents out the mortgaged land, the payments of rent to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption.

CIVIL ACTION, tried before *Boykin, J.*, December Term, 1888, of DUPLIN Superior Court.

The parties waiving a trial by jury, agreed to the following facts, with the understanding that the Court should render judgment thereon according to his opinion of the law arising therefrom:

1. Norris F. Frederick made mortgage deed for the lands in dispute on April 18, 1873, for $596.

2. After maturity of said mortgage the mortgagee advertised and sold said lands and himself became the purchaser.

3. Under and by virtue of said sale and purchase the mortgagee, the defendant in this action, entered into the adverse possession of said lands on January 1, 1874, and has

held and used them as his own ever since, and has put valuable improvements thereon.

4. At various times since such sale the defendant has received as rents for said premises large sums of money, some of which has been paid by his tenant within three years prior to the commencement of this action.

5. At the time of such sale the mortgagor was residing in a remote part of the State.

6. Norris Frederick, the mortgagor, died about the 1st day of January, 1883.

7. There has been no administrator or executor of his estate.

8. The plaintiffs in this action are infants of tender years, heirs-at-law of the mortgagor Norris Frederick, and are without any general or testamentary guardian, and have never had any guardian.

9. This action was commenced on the 6th day of June, 1887.

Upon a consideration of the foregoing facts, the Court, being of the opinion that the defendant was entitled to judgment on his plea of the statute of limitations, adjudged that the plaintiffs go without day, and they appealed.

Messrs. D. B. Nicholson and *Jno. Devereux, Jr.*, for the plaintiffs.

No counsel for the defendant.

SHEPHERD, J. (after stating the case). The defendant, after the maturity of the mortgage debt, entered into "the adverse possession" of the property on the 1st day of January, 1874. The mortgagor died about the 1st of January, 1883. The statute of limitations (*The Code*, § 152, par. 4) had, therefore, run against him for a period of nine years. This action was brought on the 6th day of June, 1887, and is barred, unless the plaintiffs can bring themselves within

some of the disabilities prescribed by *The Code*. It is well settled that, when the statute of limitations begins to run, nothing stops it. "So, when it begins to run against the ancestor, it is not suspended by any statutory disability in the heirs at the time of descent cast." Wood on Limitations, 11; *Pearce* v. *House*, Term Rep., 722 Four years after the death of the mortgagor, and about three after the equity of redemption had been barred (*Bruner* v. *Threadgill*, 88 N. C., 361), the heirs of the mortgagor, who are infants, bring this suit to redeem.

We see nothing in section 148 of *The Code*, cited by counsel, which changes the law as it formerly existed, nor do we see how section 168 of *The Code* can help the plaintiffs. Conceding that this section relates to actions other than personal, the plaintiffs have not brought themselves within its terms by suing within a year after the death of their ancestor, and there is no saving, as to infancy, in the section referred to.

There is no error in the ruling of his Honor, and the judgment will be affirmed.

No error. Affirmed.

W. J. PARKER, Adm'r, v. W. J. SUTTON and J. A. McDOWELL.

Negotiable Note—Accommodation Indorser—Collateral Oral Agreements.

A collateral oral agreement, between the maker and accommodation indorser of a negotiable note, that it should be negotiated at bank, does not affect one who purchases the note, for value and before maturity, from the maker; and this is so, although the purchaser has notice of such agreement at the time he takes the note.

PARKER *v.* SUTTON.

CIVIL ACTION, tried before *Clark, J.*, at Spring Term, 1889, of BLADEN Superior Court.

The plaintiff is the administrator of J. McK. Mulford, and brought this action against W. J. Sutton and Jno. A. McDowell, to recover the money due on a promissory note, whereof the following is a copy:

"$1,000. ELIZABETHTOWN, N. C., Dec. 10, 1882.

"Ninety days after date I promise to pay to Col John A. McDowell, or order, one thousand dollars, value received, with interest after the maturity at the rate of eight per cent. per annum.

"(Signed) W. J. SUTTON."

This note was indorsed by the payee in blank, and afterwards the blank was filled as follows: "Pay J. McK. Mulford, or order."

By consent of the parties, the Court settled the facts as follows:

"The defendant, W. J. Sutton, executed his promissory note for $1,000 on December 1, 1882, to the defendant, Jno. A. McDowell, to pay said sum ninety days after date, with interest at eight per cent. after maturity. Said McDowell indorsed said note in blank for the accommodation of the defendant Sutton, and delivered said note to him that same day. Said Sutton sold and transferred said note for full value, and before maturity, to plaintiff's intestate.

"At the time of the indorsement by McDowell of the note, it was understood and agreed between him and Sutton, that said note was to be negotiated in one of the banks in Fayetteville, N. C., and plaintiff's intestate had notice of such understanding before his purchase of said note.

"At the time of the execution of said note Sutton was not indebted to McDowell, and the indorsement by McDowell was solely an accommodation to enable Sutton to raise

money. McDowell had no notice of the sale of the note to plaintiff's intestate till after the death of such intestate, on the presentation by the plaintiff of the note for payment.

"Upon the above facts the Court rendered judgment for plaintiff."

The defendant McDowell, having excepted, appealed to this Court.

Mr. E. C. Lyon, for the plaintiff.
Mr. T. H. Sutton, for the defendant.

MERRIMON, J. (after stating the case). The note sued upon was plainly a negotiable instrument, and might, by indorsement of the payee thereof, be put upon the market and bought and sold indefinitely. The original parties to it treated it as "accommodation paper," and the facts show that the chief and material part of their purpose was to enable the maker thereof to borrow money upon it. It was expected that he would get the money from one of the banks in Fayetteville, but not necessarily from a bank, or in that town. If it had been so intended, some particular restriction in this respect would have been set forth in or about the note, but it was left at large—entirely without such restriction—to be sold to any person who might buy it. If a bank had purchased it, it could at once have sold it to the intestate of the plaintiff or any other person in the course of business. There was nothing in its nature, or in the purpose of the parties in connection with it, that rendered the sale of it to a bank necessary or at all material to its sufficiency or efficiency as a negotiable instrument; nor would the mere sale of it to a bank have given the payee, who indorsed it, any material legal advantage. There was no reason—certainly none that appears—why the intestate of the plaintiff should not have bought it on the same footing as a

bank, or any other person might have done. The simple fact that he had knowledge of the "understanding," that the money was to be obtained from a bank in the town mentioned, did not render it in any sense fraudulent on his part to buy it. This is a stronger case against the indorsee than that of *Parker* v. *McDowell*, 95 N. C., 219. The note in that case was by its terms made "negotiable and payable" at a particular bank named. It was "an accommodation paper"—was not sold to the bank, but to a different person. Nevertheless, it was held that the indorser was liable.

The objection, therefore, that the intestate of the plaintiff had notice that it was "understood and agreed" that the note should be "negotiable in one of the banks of Fayetteville," cannot be sustained, and the judgment must be affirmed.

Judgment affirmed.

ANNA GILES v. THOMAS HUNTER et al.

Husband and Wife—Husband's Right in Wife's Property—Judge's Charge, Exception to must be Specific—Deed, Mistake in—Burden of Proof.

1. Where a *feme covert* was married and became entitled to real and personal property before the Constitution of 1868, the husband had the right to the personalty on reducing it into possession, and if she allowed the proceeds of sales of the realty to be paid to him it also became his; and if such proceeds were invested, with her consent, in other lands, without request on her part that title should be made to her, and it was made to him, the land vested absolutely in him, discharged of every equity in her.

2. When a party excepts to a charge of the Judge, that there was no evidence of fraud, the exception should point out the evidence in which it is claimed that fraud appears. Otherwise, the appellate court may disregard it.

3. The proof necessary to establish an alleged mistake in a deed should be clear and convincing that a mistake was in fact made in drafting the deed.

4. A party to a civil action, who has the affirmative of a material issue, must establish his contention by a preponderance of evidence, and proof of notice of an equity is not an exception to the rule.

CIVIL ACTION, tried at the February Term, 1888, of the Superior Court of MADISON County, before *MacRae, J.*

The plaintiff alleged, in substance, and offered testimony tending to prove:

1. That she was married to one J. M. Giles before the Constitution of 1868 was adopted.

2. That at the time of her said marriage there was due her (arising from the sale of negroes and personal property and land) from the estate of her father, who died prior to the year 1854, a considerable sum of money, a part of which was in the hands of the administrator of her father, and a part was due her from her guardian.

3. That on the 8th day of September, 1868, Hannah McDowell, the mother of the plaintiff, conveyed to said J. M. Giles, by mistake of the draftsman, a tract of land (described in the complaint), it being the intention of the parties that said conveyance should be made to the plaintiff.

4. That the only consideration for the said conveyance made to said Giles was the assignment by plaintiff and her said husband of her said interest, made on September 8, 1868, in the following form, to-wit:

"Whereas, there are certain moneys due and to become due to the heirs of James McDowell, deceased, to be paid by the Clerk and Master in Equity for the county of Yancey, State of North Carolina, by whom, and under and by virtue

of a decree of the Court of Equity for said Yancey County, certain lands and other property for partition among the heirs of said estate, on the __ day of _____, 18__; and whereas, the aforesaid money is due, in part, to the undersigned Anna Giles: Now, therefore, know all men by these presents, that we, J. M. Giles and Anna Giles his wife, of the county and State aforesaid, for and in consideration of the sum of $1,650, to us in hand paid by Hannah McDowell, of the county of Madison, State aforesaid, the receipt whereof is hereby acknowledged, have, on this 8th day of September, 1868, and we do hereby assign, transfer and set over unto the said Hannah McDowell and her heirs the full amount of said sum of $1,650 and all other moneys due us from any part of said estate from the Clerk and Master and guardian of said heirs of James McDowell, deceased, to the said Anna Giles, as one of the heirs of James McDowell, deceased, aforesaid; and we do hereby direct and instruct the Clerk and Master in Equity of the Court aforesaid, and said guardian of the heirs of James McDowell, deceased, to pay over to the said Hannah McDowell and her heirs the whole amount of said estate due us in any way, or by such decree. In witness whereof," &c.

5. That the defendants purchased said land at an execution sale by the Sheriff, with notice of the plaintiff's equity, and afterwards, the said J. M. Giles conveyed the said land to them.

The defendants answered and offered evidence tending to show that there was no mistake in drawing the said deed, but that it was drawn under instruction of the grantor, Hannah McDowell, and that the conveyance was made to J. M. Giles because he had an interest in the money due to his wife, could reduce it to possession, and it would then be his property, and the plaintiff's mother was anxious to convert the fund into land to prevent J. M. Giles from spending it. The defendants denied notice of any claim on the part of

plaintiff before purchasing the land, and alleged that her mother, Hannah McDowell, was a bidder at the sale, and also denied the allegation of the complaint generally.

A great deal of evidence was offered to sustain the contentions on each side.

The first issue involved the question, whether the deed was drawn by mistake; the second, whether the assignment set forth above was the consideration for the execution of the deed, and it was admitted that it was. The third issue involved the question, whether the defendants had notice of plaintiff's claim when they bought. The fourth issue was an inquiry as to damage.

The plaintiff prayed the Court to instruct the jury as follows:

"1. That if it was the intention and contract of the parties to the deed, in which Giles' name appears, that the deed was to be made to Anna Giles, whose name was not inserted by the draftsman, then the plaintiff is entitled to have the same corrected; and if the proofs satisfy the jury of these facts, then they should find 'Yes' to issue No. 1. That to determine this fact, they may look to all the circumstances, the consideration paid, &c.

"2. That although the property of the wife in this case should have belonged to the husband, in consequence of his rights accruing prior to 1868, yet, if he made an agreement that the deed should be made to his wife, it is equivalent to the agreement that the property thus obtained by the marriage should be vested in lands for her benefit, and if such agreement was violated by mistake, the plaintiff is entitled to recover.

"3. That when land is sold at a chancery sale, the money for which it sells remains as real estate as to infants and *femes covert* until the change of the same in some of the modes required by law.

"4. That the relation of husband and wife is a delicate and fiduciary relation, and the dealings between husband and wife, by which the husband gets an advantage, is to be scrutinized by the courts.

"5. The law provides a mode by which a married woman shall dispose of her property, and no mere tacit acquiescence of the wife will estop her from asserting her rights."

The Court instructed the jury as follows:

"The first issue submitted is, whether the deed from Mrs. McDowell to James Giles was so made by mistake or fraud, and was it really intended by the parties to have been made to the plaintiff, Mrs. Giles, instead of to her husband? The testimony offered by plaintiff tends to prove that it was the result of a mistake; that the intention of Mrs. McDowell and of Giles and his wife was, that it was to be made to Mrs. Giles, and that when Mrs. McDowell instructed the draftsman how to write it, she told him to make to Mr. Giles, instead of to his wife, by mistake. On the other hand, the testimony offered by the defendant tends to contradict this theory, and to prove that it was well understood between all the parties interested that it was to be made just as it was made, and that there is no mistake about it. There is no evidence of any fraud in the making of this deed.

"In order to enable this Court, which for the trial of this action is a Court of Equity, to settle the matters in controversy between the parties, as this is one of the questions which can alone be determined by a jury, the Court asks you to find, whether it is true that there was a mistake in the insertion of the name of James Giles instead of Anna Giles as grantee. A deed, on account of the manner in which it is executed, is presumed to mean what it says, and it requires the strongest proof before a jury can declare that there was a mistake in it, and so empower the Court to have it changed in its effect. I have endeavored to give you the testimony fully upon this point as it was delivered by the

witnesses, and you have had the benefit of argument from many counsel as to the effect of that testimony. Now, if, upon a careful consideration of the whole of the evidence, you have been satisfied that there was a mistake made by Mrs. McDowell in directing the draftsman to write the deed so as to convey the land to James Giles instead of his wife, and that Giles and his wife and Mrs. McDowell had really agreed to have it made to Anna Giles, you will respond to this issue, 'Yes.' But unless you are clearly convinced of this fact—if you are still in doubt about it, you will answer, 'No.' If your response is in the negative, you may return your verdict without considering the other issue; but, if in the affirmative, you will proceed to the consideration of the second issue.

"2. 'Was the land which was conveyed by said deed paid for by a conveyance of plaintiff's interest in the estate of her father?'

"If you have answered 'Yes' to the first issue, and if you believe the testimony offered on this point, you will respond to the second issue 'Yes,' for all the testimony tends to prove that the assignment or conveyance made by Giles and wife to Hannah McDowell was made in consideration of the conveyance by Hannah McDowell of the land in dispute, either to Giles or his wife. The marriage of the plaintiff to James Giles having taken place, if you believe the testimony, before the adoption of the present Constitution, the husband also had his vested rights in his wife's property, real and personal, but it was still the plaintiff's interest in the estate of her father which was conveyed by the deed or assignment of plaintiff and her husband to Hannah McDowell.

"3. The third issue is, did defendants have notice of plaintiff's equity of any right plaintiff might have had to have the deed reformed so as to make it read to *her* instead of to her husband, or to have him declared a trustee for her benefit? This

notice may be actual notice, or it may be the knowledge of circumstances which ought to lead to further inquiry into the matter, and which would upon such inquiry give information of the equity. Has the plaintiff satisfied you, by a preponderance of evidence, that the defendants did have notice? Defendant Hunter, it is admitted, claims under Trull & Guthrie, and is affected by notice to them, if there was any. Did Mrs. McDowell forbid the sale and give notice then and there, or did she, before the sale by the Sheriff (which is admitted to have been before the deed from James Giles to defendant), notify them, Trull & Guthrie, that her daughter was the real owner of the land? or do the circumstances testified to, and which you believe, satisfy you that defendants had this notice before they bought the land? If so, respond 'Yes' to the issue; if not, respond 'No.' And if you respond 'No' to this issue, you need not trouble yourselves further; but if you say 'Yes,' you must consider the last issue, Fourth, as to damages: The damage would be a fair rental value of the land, for from three years before the action was begun until the trial—1872 to 1888—nearly sixteen years, and the amount of damage done to the land by defendants. Of course this would be offset by the improvements, if any, put upon the land by defendant."

The plaintiff excepted to the charge given, and to the refusal to give instructions asked.

The jury found the first issue for the defendants.

The plaintiff moved the Court for judgment, *non obstante veredicto*, upon the alleged grounds that, the land having been paid for by the property of Anna Giles, due her prior to the adoption of the Constitution of 1868, the deed made by her husband, James Giles, to the defendants, for the land in dispute, could pass no title to the defendant, without the signature and privy examination of Anna Giles, under the act of 1848–'49; but this motion was refused by the Court, and the plaintiff excepted.

The plaintiff moved for a new trial, on the following assigned errors in the charge to the jury:

"1. In holding that there was no evidence of fraud.

"2. To so much of the charge as related to the measure of proof required to show a mistake in drawing a deed, in order to reform it.

"3. That the Court instructed that notice might be shown by a preponderance of evidence.

"4. For error in not giving the special instruction as prayed for by the plaintiff."

Judgment for defendant, and appeal by plaintiff.

Mr. Chas. A. Moore, for the plaintiff.

Messrs. W. W. Jones and *Theo. F. Davidson*, for the defendants.

AVERY, J. (after stating the case). The plaintiff asks for judgment upon the verdict on the ground that the consideration of the deed executed by Hannah McDowell to James M. Giles, the plaintiff's husband, on the 8th of September, 1868, was the assignment by her of her interest in a fund arising from the sale of the property of her father, who died prior to the year 1858.

The plaintiff was married to Giles before the Constitution of 1868 became a law. The husband could, therefore, have acquired the absolute title to his wife's personal property by reducing it to possession. If the money arising from the sale of the land was allowed, by her consent, to be paid to him, it became his property. If it was invested, with her consent, in other lands, and with no request on her part that the land purchased should be conveyed to her or for her benefit, and the husband took title to himself, the land vested absolutely in him, discharged of any equity in her. *Temple* v. *Williams*, 4 Ired. Eq., 39; *Black* v. *Justice*, 86 N. C., 504; *Hackett* v. *Shuford*, 86 N. C., 144.

Even the right on the part of the husband to reduce to possession money due to the wife, though not exercised by him, would constitute a sufficient consideration to support a deed to him for land; and where, as in this instance, the wife joins in assigning a fund, arising in part from sale of personalty, and in part from sale of land belonging to her father's estate, and that assignment is the consideration of the conveyance made to him, there is no resulting trust raised in the wife as to the land conveyed.

The plaintiff excepts to the charge of his Honor, that there was no evidence of fraud.

By a careful review of the evidence sent up, we discover no testimony tending to prove fraud. The exception, as stated in the record, did not make it incumbent on the appellate court to examine the evidence for the mere purpose of passing upon this exception, unless the plaintiff had pointed out, in the mass of testimony, that relied upon to show that the Court below was in error. It is questionable, too, whether the complaint contains a sufficient allegation of fraud, as distinguished from mistake.

The next exception was to that portion of the charge of the Court in which the law, as to the measure of proof necessary to establish an alleged mistake in a deed and entitle a complainant to a decree ordering the deed to be reformed, was stated. The plaintiff has no reason to complain of the instructions on this point.

In the case of *Harding* v. *Long* (decided at the present term), this Court reiterated the principle (first laid down as applicable to jury trials in *Ely* v. *Early*, 94 N. C., 1) that an alleged mistake in a deed must be shown by clear and convincing proof, in order to justify a verdict finding that a mistake was in fact made in drafting it.

The only remaining assignment of error is, that the Judge erred in instructing the jury that the burden was upon the plaintiff to show, by a preponderance of testimony only, that

the defendants had notice of the equitable claim of the plaintiff. We cannot understand, if it is material, why such an objection and exception should emanate from the plaintiff; but it so appears of record. The general rule is, that a party to a civil action, who has the affirmative of an issue, is required to show his contention by a preponderance of testimony. The proof of notice of an equity does not constitute an exception. Besides, the jury were properly told that if they found, in response to the first issue, that there was no mistake, it would not be necessary for them to pass upon the third issue.

No error. Affirmed.

W. B. FRY v. D. A. B. CURRIE.

Petition to Rehear; Rules Governing.

1. The decision in *Fry* v. *Currie*, 91 N. C., 436, re-affirmed.
2. The weightiest considerations make it the duty of the Court to adhere to its decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court.
3. It is not sufficient merely that two members of the bar—who perhaps have not heard the argument, and may not have given the same careful consideration to the question decided as was given by the Court—are of opinion, and so certify, that the Court has committed an error.
4. The practice does not admit of a simple repetition of an argument already heard, weighed, and passed upon after full deliberation.

Petition to rehear and reverse the decision of this case made at October Term, 1884. (See 91 N. C., 436.)

Messrs. McIver & Black, for the plaintiff.
Mr. J. W. Hinsdale, for the defendant.

SMITH, C. J. This cause, the ruling in which we are now asked to rehear and reverse, was decided and the appellant's exceptions adversely disposed of at Fall Term, 1884, of the Court. It was based upon an adjudication made in *Mason* v. *McCormick*, three years previous, which, during this interval, seems not to have been questioned, to the effect that boundary lines may be proved by declarations of old and deceased persons, made *ante litem motam*, and having personal knowledge of the locality, even when coming from an adjoining proprietor. The ruling has since been approved in *Smith* v. *Headrick*, 93 N. C., 210; *Halstead* v. *Mullen*, *ibid.*, 252, decided a year later, and in the more recent case of *Bethea* v. *Byrd*, 95 N. C., 309.

The language of MERRIMON, J., in the last named case, is distinct and emphatic, when speaking of the witness who testifies: "The mere fact that he was the owner of an adjoining tract of land did not necessarily make him interested; he was not seeking to point out his own corner, but that of the 'Clevins grant'; not to promote his interest and advantage, to enlarge or change his boundary, or those of any other person. So far as we can see, he was content with his own lines and boundary. It seems that he was entirely disinterested, and his declarations come exactly within the exceptions above pointed out."

The other ruling contested, to-wit, that exceptions to the charge of the Court in general, and pointing out no particulars in which error is assigned, cannot be entertained upon an appeal, has been so frequently and uniformly asserted, that it cannot be necessary to refer to specific cases in which it has been so ruled.

The question of possession under and by virtue of color of title, to ripen and perfect that title, pressed with some earnestness now, was not the ground upon which the vesting of the estate was claimed, but it was derived from a regular chain of conveyances, originating in a grant from

the State in November, 1820, issued to Thomas Bryant, for 100 acres, and terminating in the Sheriff's deed, made in 1841, to the plaintiff pursuant to a sale under execution issued to him, and the controversy was concerning the location of the lines of the grant, so as to cover the land claimed in the action.

In re-examination of the case on appeal, while the answer denies the *wrongful possession* of the land, and thus imposes upon the plaintiff the burden of proving the defendant to be in possession, and wrongfully so, the sufficiency of the evidence, if there be any, to warrant the finding, was for the consideration of the jury, and, therefore, the only point that could arise for reviewal on appeal is presented as to their being any evidence reasonably sustaining the verdict in response to the second issue. Upon this the Court ruled, that there was some evidence, and it is set out in the case on appeal.

Moreover, no direction was asked to be given to the jury, and none seems to have been given, beyond the summary statement of acts of ownership exercised over some of the land by one of the preceding parties through whom the plaintiff claims, in resistance to an asserted authority over the same by the grantee, the father of the defendant, and under whom he claims, and the cause seems to have proceeded and to have been determined upon the sole inquiry as to the position of the boundary.

We recur to these matters, in connection with the former trial, not to uphold the rulings then made, preferring to let their vindication rest upon the reasoning and supporting authorities contained in the opinion, but rather to show that the exceptions now urged were fully and carefully considered and decided then; and, according to the practice, notwithstanding the certificate of counsel that we committed errors, the case is not presented in which we should be called on to unsettle the law as declared. The rule on the subject,

in the clear and forcible language of the late Chief Justice, is thus stated in *Watson* v. *Dodd*, 72 N. C., 240:

"The weightiest considerations make it the *duty of the Court to adhere to their decisions.* No case ought to be reversed upon petition to rehear, *unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court.*" This is reiterated in *Hicks* v. *Skinner*, in the same volume, at page 1, and again by the present Court in *Haywood* v. *Daves*, 81 N. C., 8; *Devereux* v. *Devereux*, *ibid.*, 12; *Lewis* v. *Rountree*, *ibid.*, 20, and recently in *Hannon* v. *Grizzard*, 99 N. C., 161.

It is not suggested that any of these considerations underlie and sustain the present application, and we have but a repetition of the argument, urged with equal earnestness, and as much, but not more, legal learning at this rehearing.

We must adhere to the rule announced, and it is not sufficient merely that two other members of the bar, who, perhaps, have not heard the argument, and may not have given the same careful consideration to the question raised and decided, are of opinion, and so certify, that the Court has committed error in its exposition of the law, though this is an indispensable prerequisite to the filing the petition. The practice does not admit of a simple repetition of an argument already heard, weighed and passed upon after full deliberation, and the law must be considered settled after an adjudication, and not open to renewed discussion, except under the conditions mentioned; and when shown, the Court will be always ready to correct its own errors and oversights. But the security of suitors, and other considerations of the greatest moment, demand the maintenance of such principles of law as are declared in cases involving their determination, unless the error is clearly made to appear.

The application must be denied and the petition dismissed.

Dismissed.

R. R. COMRON v. D. B. STANDLAND.

Chattel Mortgage Given of—Mortgage in Lieu of Bond—The Code, §§ 117-120 not Applicable to Justice's Courts—The Code, §§ 283, 414—Submitting Issue of Law to the Jury

1. *The Code*, § 117, *et seq.*, has no application to Courts of Justices of the Peace.

2. There is no statutory provision that a debtor's mortgage of real or personal property to be given in lieu of the undertaking on appeal from a Justice's judgment required by *The Code*, § 283, *et seq.*

3. Although neither the Justice nor the plaintiff is required to accept a mortgage from the defendant in lieu of an undertaking on appeal, yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage.

4. No particular form is essential to the validity of a chattel mortgage, nor ordinarily will a seal vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or by just implication the purpose of the parties to transfer the property to the mortgagee to be retained by the mortgagee upon the performance of the conditions agreed upon, however informally expressed. A power of sale is not essential.

5. A writing was entitled "A. v. B. Undertaking on appeal from Justice's judgment." It recited a judgment rendered against B. in favor of A and the intention of B to appeal therefrom, and then provided as follows: "Now, therefore, for the purpose of securing the payment of all damages and costs which may be awarded against him, and so much of the judgment or any part thereof that may be affirmed, the said B does give the following articles of personal property" (describing the property). The writing was signed by B. but not sealed. *Held*, to be good as a chattel mortgage.

6. Whether a writing, claimed to be a mortgage, is such or not, is a question of law, and should not be submitted to a jury.

7. If a question of law is improperly submitted to a jury, but the verdict finds it correctly, no harm is done and no exception lies.

CIVIL ACTION, tried before *Connor, J.*, at October Term, 1887, of BRUNSWICK Superior Court.

Judgment for plaintiff, and defendant appealed.

The facts appear in the opinion.

Mr. J. D. Bellamy, for the plaintiff.

Messrs. T. W. Strange and *Ernest Haywood*, for the defendant.

MERRIMON, J. The plaintiff obtained a judgment in the Court of a Justice of the Peace against the defendant for $110.84, and the defendant appealed therefrom to the Superior Court, but failed to give an undertaking on appeal to stay execution pending the appeal, as allowed by the statute (*The Code,* §§ 883, 884). He, however, in lieu thereof, and for the purpose of such stay, executed and the plaintiff accepted a paper-writing, which was duly proven and registered, whereof the following is a copy:

"STATE OF NORTH CAROLINA—BRUNSWICK COUNTY.

"R. R. COMRON *v.* "D. B. STANDLAND. } Undertaking on Appeal from Justice's Judgment.

"Whereas, on the 23d day of February, 1885, the plaintiff recovered judgment against the defendant before S. J. Stanly, Justice of the Peace, for one hundred and ten dollars and eighty-four cents; and whereas, the said defendant intends to appeal therefrom to the Superior Court of said county, and desires to stay all proceedings thereon: Now, therefore, for the purpose of securing the payment of all damages and costs which may be awarded against him, and so much of the judgment, or any part thereof, that may be affirmed, the said D. B. Standland does give the following articles of personal property: Two mules, flesh-marks pale yellow, worth two hundred and fifty dollars; and said mules are free and

clear of all incumbrances whatsoever, and that the said D B. Standland has the right to convey the same.

"This 23d day of February, 1885.

"(Signed) D. B. STANDLAND.

"Witness:

"(Signed) S. J. STANLY."

The purpose of this action is to enforce this paper-writing as a chattel mortgage. The defendant contends that it is not such mortgage, nor was it so intended; that it was intended to be an undertaking on appeal, but is not; that it is void, "because it did not conform to the statute, and because it is without consideration, and had no obligee named therein."

The Court submitted the following, among other issues, to the jury, and they responded to the same as stated at the end thereof:

"Did the defendant intend the paper-writing as a mortgage, or did he intend it as an undertaking to secure the plaintiff's debt on appeal?" Answer, "Mortgage."

There was a verdict and judgment for the plaintiff.

The defendant assigned error as follows, and appealed to this Court:

"1. The Court erred in submitting issue number three to the jury, because it was a paper-writing whose terms were certain, and its construction was a matter for the Court.

"2. The Court erred in refusing to give the following instruction: 'That inasmuch as a Justice of the Peace had the right to accept an undertaking on appeal, but no right to accept a chattel mortgage in lieu of such an undertaking, they must presume that this instrument was given in accordance with law as an undertaking on appeal, and not as a mortgage.'

"3. The Court erred in sustaining the validity of this instrument, (1) because, being void as an undertaking, it

could operate as nothing else; (2) because it appeared upon its face that it was without consideration; (3) because there was no obligee specified or mentioned in the instrument itself."

The statute (*The Code*, §§ 117, 120) has no application in Courts of Justices of the Peace, as seems to have been supposed by the parties to this action. It prescribes the duties of Clerks of the Superior Courts, and allows a mortgage of real estate to be given by parties to actions in the cases and as and for the particular purpose specified. The statute (*The Code*, §§ 883, 884) applies particularly to appeals from judgments in Courts of Justices of the Peace, and it is by it provided that the appellant shall, in such cases, be allowed to give an undertaking by one or more sureties, to be approved, "to the effect, that if judgment be rendered against the appellant, the sureties will pay the amount, together with all costs, awarded against the appellant; and when judgment shall be rendered against the appellant, the appellate court shall give judgment against the said sureties." There is no statutory provision that allows a mortgage of real or personal property to be given in lieu of and for the purpose of an undertaking on appeal from such judgment.

The defendant failed to give the undertaking on appeal from the judgment of the Justice of the Peace, but he gave the paper-writing in question, a copy of which is set forth above.

The Justice of the Peace could not require the plaintiff to accept it, or a like instrument; nor did the defendant have any right to require him to accept it, in the absence of statutory provision so prescribing, but there was no legal reason why the plaintiff, if he saw fit, for any consideration, might not accept it and allow the stay of execution as a consideration for it. He had the right, in the

absence of the usual undertaking on appeal, to issue execution (*The Code*, § 875), and he might not stay it pending the appeal, and thus the defendant might have suffered harm or disadvantage. There was no legal obstacle in the way to prevent the arrangement made voluntarily by and between the parties, for their common convenience.

The paper-writing, called "an undertaking on appeal," is very informal, but it is not wholly insensible—its nature and purpose are obvious. The defendant intended by it to mortgage the two mules described therein to the plaintiff for the purpose therein specified, in order to obtain the stay of execution, and the plaintiff accepted the mortgage, as he might do. The stay of execution was a valuable and sufficient consideration to support the contract of mortgage. The names of the parties to it were mentioned in the caption at the top of it, and plainly, the stipulations and agreement embraced in the writing had reference to and were between them, and sufficiently pointed and expressed their mutual agreement—they were respectively designated certainly as plaintiff and defendant. The expressed purpose was to obtain the stay of the execution referred to for the benefit of the defendant; and to *secure* the payment of so much of the judgment mentioned therein as might be affirmed in the appellate Court, the defendant "do (doth) give the following articles of personal property, two mules, flesh-mark pale yellow"—that is, the mules were given, sold, to the plaintiff to secure the payment of the judgment he expected to obtain. This was the obvious implication from the words employed and the nature of the transaction. The condition implied was, that the mules shall be sold and the proceeds of sale applied to the payment of the judgment, when obtained, if the defendant should fail to pay it; and if the judgment, or some part of it, should not be affirmed in the appellate Court, then the mules revest in and be the property of the defendant. *Holly* v. *Perry*, 94 N. C., 30.

No particular form is essential to the validity of a chattel mortgage, nor will mere informality defeat its purpose. It is not necessary that it shall be under seal, because the title to personal property will pass without deed. It is sufficient, if the words employed express in terms, or by just implication, the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed, and the mortgage may or may not have a power of sale annexed thereto. *Rawlings* v. *Hunt*, 90 N. C., 270; *McCoy* v. *Lassiter*, 95 N. C., 88; *Frick* v. *Hilliard*, 95 N. C., 117.

The law determined the legal nature and effect of the instrument in question, and hence the Court should have decided upon it without submitting to the jury the question whether or not it was intended to be a mortgage. But any objection on this account was obviated by the finding of the jury, which was in harmony with the law applicable. The submission of the issue did no harm, in view of the finding upon it.

A remaining assignment of error is so imperfect that we cannot pass upon its merits. A paper-writing essential to it does not appear in the record. Hence, we pass it without further notice.

No error. Affirmed.

W. A. BROWN et al. vs. ROBINSON BROWN.*

Cherokee Lands—Legislative Control over Public Lands—Grants, Void and Voidable—Construction of Statues not based on Policy—The Code, §§ 2346, 2347.

1. A grant of lands within the Cherokee Indian boundary is void.
2. It is the province of the legislative department to prescribe when, how, and for what purpose the lands of the State may be granted. In the absence of such legislation neither the Governor, Secretary of State nor any agency can pass title to State lands by grant or otherwise.
3. A grant of lands *not subject to grant* is void and can be attacked collaterally. If the land granted *is subject to grant*, but the grant itself was obtained by fraud, or there were irregularities attending its issue, it cannot be attacked *collaterally*.
4. What is called the policy of the Legislature is too uncertain a ground upon which to found the interpretation of statutes, especially when the statutes are clear and absolute in their terms and expressed purpose.
5. The treaty of Holston between the United States and the Cherokee Indians did not have the effect to repeal or modify the entry laws of this State.

The opinion in this case was delivered at September Term, 1888, but a petition to rehear having been filed, it was not reported until the decision of the application to rehear. Both opinions are now reported in the order in which they were delivered.

This action was brought to recover the land described in the complaint. On the trial the plaintiff introduced in evidence and relied upon a grant from the State, issued to David Allison on the 29th day of November, 1796, for 250,240 acres of land, described by metes and bounds, but the description did not mention what was commonly called the

*AVERY, J., did not sit in this case.

"Indian reservation," nor was that reservation, or what was known as "the Meigs and Freeman line," mentioned or referred to in the grant.

There was evidence that the lands in controversy were not within the old Indian reservation, but were on one side of it, and east of the Meigs and Freeman line, which established the Indian boundary line, and that the same was situated between the waters of Wolf and Tennessee creeks, and immediately on Wolf Creek, and it was shown that both of said creeks flowed into the Tuckaseege River.

The defendant introduced no evidence.

As to the grant mentioned, his Honor charged the jury, that the boundary line of the State grant to David Allison extended along the dividing ridge between the waters of Pigeon River and Tuckaseege River, and did not include any of the land lying on the waters of the Tuckaseege River, they not being subject to entry at the date of the Allison grant. To this the plaintiffs excepted.

There was a verdict and judgment for the defendant, and the plaintiffs having assigned error, appealed to this Court.

Messrs. M. E. Carter, R. D. Gilmer, W. W. Jones and *Theo. F. Davidson*, for the plaintiffs.

No counsel for the defendant.

MERRIMON, J. (after stating the case). The instruction of the Court to the jury, excepted to, rests upon the ground that the evidence of the plaintiffs, accepted as true, proved that the lands in question were situated between the waters of Wolf and Tennessee creeks, immediately on Wolf Creek; that both of these streams flowed into Tuckaseege River; that the line between the land of the State and the same of the Cherokee Indians, at and before the date the grant mentioned was issued, began "on the Tennessee where the southern boundary of this State intersects the same nearest

to the Chickamauga towns; thence up the middle of the Tennessee and Holston to the middle of French Broad; thence up the middle of French Broad River (which lines are not to include any island or islands in the said river) to the mouth of Big Pigeon River; thence up the same to the head thereof; *thence along the dividing ridge between the waters of Pigeon River and Tuckaseege River, to the southern boundary of this State,*" and that the land being situate on the waters flowing into the Tuckaseege River, and within the boundary of lands belonging to the Cherokee Indians, the grant, if it embraced the lands in question, was as to them void, because the laws of this State prevailing at and before the date of the grant did not allow, but on the contrary forbade, such lands to be entered and granted by it.

The Court said, "the boundary line of the State grant to David Allison extended along the dividing ridge between the waters of Pigeon River and Tuckaseege, and did not include any of the land lying on the waters of the Tuckaseege, they not *being subject to entry* at the date of the Allison grant," and we are of opinion that this instruction was correct.

It is not denied that the grant to David Allison could not pass the title to the land in controversy to him, if that land was not subject to entry and grant under the laws of this State at the time it was issued. It is the province of the law-making power of the State to prescribe, by proper enactments for the purpose, when, how, and for what purpose and considerations its lands shall become the property of individuals, and how and by what means of conveyance the title thereto shall pass to them; and in the absence of such enactment neither the Governor nor the Secretary of State, nor any agency, can pass such title by grant or otherwise. Hence, what purports to be a grant of lands, which the law has not made the subject of entry and grant, is void, and it will be so treated in all courts. It would be otherwise, how-

ever, if the land was subject to entry and grant, and the grant should be impeached for fraud, defects, and irregularities in matters and things preliminary and leading to its execution and issue. In such case it could not be attacked collaterally—it could be impeached only by an action brought to have it declared void. Fraud or mere irregularities may be waived, but that which is essential to give life and operative effect to the grant cannot be waived. The Court will regard it as void whenever it appears that the essential requisite is absent. *Reynolds* v. *Flinn*, 1 Hay., 123 (106); *Avery* v. *Strother*, Conf. R., 434; *Lovinggood* v. *Burgess*, Busb., 407, and cases there cited.

Then, adverting to the law applicable and prevailing at the time the grant under consideration was issued, it appears that the statute (Acts 1777, 1 Pot. Rev., ch. 114, p. 274) provided "for establishing offices for receiving entries of claims for lands," and granting the same. That statute was afterwards amended by the statute (Acts 1778, 1 Pot. Rev., ch. 132, p. 354), and section four thereof prescribes "that for the future no person shall presume to enter or survey any lands within the Indian hunting grounds, or without the limits of the land heretofore ceded by the Indians or conquered from them, which limits westward are hereby declared to be as follows, that is to say," &c. Such limits were particularly prescribed, and all the lands embraced by the grant in question were, at the time of and before the enactment of this statute, within the boundary of the land so set apart to the Cherokee Indians, and, therefore, not subject to entry and grant. It is further declared in this statute "that all entries and surveys of land heretofore made, or which hereafter may be made, within the said Indian boundaries, are hereby declared to be utterly void and of no effect."

The operation of the above mentioned statutes was suspended by the subsequent statute (Acts 1782, 1 Pot. Rev.,

ch. 172, p. 413), but this statute was repealed by a subsequent one (Acts 1783, 1 Pot. Rev., ch. 185, p. 435, *The Code*, §§ 2346, 2347), and the latter amended, modified and re-enacted that first above mentioned. The fifth section of the last mentioned statute prescribes the boundary of the lands of the Cherokee Indians, just as recited above in the first paragraph of this opinion, and the sixth section thereof prescribes "that no person shall enter and survey any lands within the bounds set apart for the Cherokee Indians, under penalty of fifty pounds specie for every such entry so made, to be recovered in any court of law in this State by and to the use of any person who will sue for the same; and *all such entries and grants thereupon*, if any *should be made, shall be utterly void*."

These enactments make manifest the settled purpose of the Legislature not to allow any lands, while they continued in force, within the boundary prescribed of the lands set apart to and for the Cherokee Indians, to be subject to entry and grant. The terms employed to express such purpose are strong, unequivocal and mandatory. Such entries and grants are expressly forbidden, and if such entries were made or grants issued, they were declared to be utterly void.

This fixed purpose appears in subsequent statutes (Acts 1809, 2 Pot. Rev., ch. 774, p. 1161; Acts 1817, 2 Pot. Rev., ch. 950, p. 1408). Indeed, such purpose appears in all subsequent legislation in this State in respect to the Cherokee Indians and "Cherokee lands," a fruitful subject of legislation. And it seems to us that there can be no reasonable doubt that the boundary line specified in the statute above cited (Acts 1783, ch. 185, § 5), continued to be the boundary line until that statute was repealed, amended or modified by appropriate legislative enactment, and that for all appropriate purposes it continues to be such to this day. It is expressly recognized in *The Code*, §§ 2346, 2347.

The pertinent statutes above mentioned were in force at the time the grant in question issued and the entry on which it was founded was made. It was, therefore, "utterly void" as to any land embraced by it within the boundaries of the land so set apart to the Cherokee Indians. It appeared on the trial that the land in controversy was situate within that boundary; that is, on the waters that flowed into the Tuckaseege River, and within the grant. As we have seen, the grant was, as to it, inoperative and void—passed no title.

The plaintiffs contended that the "treaty of *Holston*," concluded on the 2d day of July, 1791, between the United States and the Cherokee Indians, extinguished the title and right of those Indians to the territory embracing the lands embraced by the grant in question, and that by such treaty and extinguishment these lands became the property of this State, and subject, as a consequence, to entry and grant.

Whatever other effect the treaty mentioned may have had, it certainly could not have repealed or modified a statute of this State that expressly forbade the entry and grant of the land within the boundary mentioned in such or any respect. There was nothing in the several statutes cited above, or any other statute within our knowledge, that, in terms or by just implication, rendered the lands of the Cherokee Indians subject to entry and grant under the laws of this State, when and as soon as their title to these lands should be extinguished in its favor. On the contrary, they were expressly and without qualification excepted from the operation of the entry laws.

It was said on the argument that the purpose of such exception was based upon the *policy* of the Legislature to pacify the Indians, to cultivate peace and friendship with them, and to protect them from the aggressions and depredations of the white people; and when they ceased to own the land set apart to them, the policy and purpose of the statute and the exception were over—ended—and ceased to

have operative effect. But the statute does not so declare, and there are no words or provisions in it that imply that it shall operate only so long as the Indians shall continue to own the land. Moreover, what is called the *policy* of the Legislature, in respect to particular enactments, is too uncertain a ground upon which to found the judgment of the Court in the interpretation of statutes, especially when they are clear, unequivocal and absolute in their terms and expressed purpose. It seems to us that it would be an unwarranted stretch of judicial authority to declare that the statutory provision in question was in effect repealed by the treaty mentioned, and go still further and hold that the lands affected by it, as a consequence, at once became subject to entry and grant. Conceding that the Indian title to the land was extinguished by the treaty, it was the province of the Legislature to repeal or modify the statute and make disposition of the land, as it did do by subsequent legislation from time to time, but not in accordance with the general entry laws.

The appellant's counsel cited and relied upon the case of *Strother* v. *Cathey*, 1 Murph., 162, which decides "that although the act of 1783 (the statute in question) has not been expressly repealed by the Legislature, yet it is effectually and substantially repealed by the treaty"—that mentioned—and an entry of land within the Indian boundary made in 1791, and the grant issued therefor in 1803, were upheld as valid and effectual. That case was decided by only two Judges, whose reasoning and interpretation of the statutes opposite, it seems to us, are not satisfactory. It is directly opposed by the case of *Avery* v. *Strother*, Conf. Rep., 434 (Tay. & Conf. Rep., 496), decided by four Judges. In this case the entry was made in 1791, after the treaty mentioned, and the grant issued on the 4th of January, 1792. It appeared that the entry was not made in a proper county, but the Court expressly declared that the statute of 1783

above cited, was then—after the treaty—in force, and that the entry and grant were therefore void and passed no title.

In the case of *Strother* v. *Cathey, supra*, the Court laid much stress upon the clause of the statute of 1777 above cited, which required the entry-taker to "receive entries for any lands lying in such (any) county which have not been granted by the Crown of Great Britain or the Lords Proprietors of Carolina, or any of them, in fee before the 4th day of July, 1776, or which accrued *or shall accrue* to the State by treaty or conquest," but surely this general provision could not be construed as embracing lands particularly and positively excepted from entry and entry laws by subsequent enactment, unrepealed, as we have pointed out above.

The appellant's counsel insisted, also, that the boundary line of the Indian lands was not certain and fixed as appears from the statute (Acts 1809, 2 Pot. Rev., ch. 774, p. 1161), which made what is there designated as the "line run by Meigs and Freeman" a permanent boundary line of the Indian lands. This line was the result of treaty stipulations subsequent to the boundary first above recited and established, and it was not surveyed and settled until 1802, long after the grant in question issued. The boundary line prescribed by the statute of 1783 was a certain line marked by natural boundaries, unmistakable, and there could be no doubt as to its location.

What we have said is conclusive against the appellant, and we need not advert to the second exception.

No error. Affirmed.

W. A. BROWN et al. v. ROBINSON BROWN.

Petition to Rehear.

1. The statute (Acts 1794, 1 Pot. Rev., ch. 423) amendatory of the statute (Acts 1784, 1 Pot. Rev., ch. 202), rendered the lands acquired by this State by the treaty of Holston from the Cherokee Indians, subject to entry and grant.
2. The judgment entered in this case at the September Term, 1888, of this Court, is set aside, and a new trial is ordered, because of the act of 1791 (Haywood's Manual, p. 188). which was not called to the attention of the Court when the case was first argued.

MERRIMON, J. This is an application to REHEAR the case of *Brown* v. *Brown*, decided at the last term. From the opinion of the Court delivered in that case, it will plainly appear that its decision was founded upon the ground that the treaty of Holston, ratified the 11th of November, 1791, referred to very fully, had not the effect to repeal or modify the statute (Acts 1783, 1 Pot. Rev., ch. 185) settling and prescribing the boundary of lands of the Cherokee Indians, and absolutely forbidding the entry and grant of any land within that boundary. The counsel for the appellants, on the argument of the appeal, insisted strongly that the treaty had such effect, and cited *Strother* v. *Cathey*, 1 Murph., 162, and other cases, in support of their contention. It was not contended or suggested that there was any statute or statutory provision that repealed or modified the statute cited above—none was called to our attention—nor did our protracted and industrious researches in the course of reaching a conclusion enable us to find one. In the absence of such repealing or amendatory statute, unquestionably the decision of the Court was correct, and this is now freely conceded by the learned counsel of the appellants.

But it is alleged in the petition to rehear, and earnestly contended by counsel, that the treaty mentioned certainly

extinguished the title or claim of the Cherokee Indians to the land embraced by it in favor of this State, as far to the west as the "Meigs and Freeman line," and that the State owned it as part of its vacant lands, at once upon the ratification of the treaty; that the statutes enacted subsequently to that treaty creating the county of Buncombe, which embraced all the land of the Cherokee Indians in this State, had the implied effect to render such vacant lands subject to entry and grant; and as the entry of David Allison, embracing part of such vacant land, was made on the 4th day of May, 1795, in the county of Buncombe, and the grant thereupon issued to him on the 29th of November, 1796, it must be valid and operative. The statute creating the county of Buncombe did not mention or refer to it—certainly did not in terms—the statute first above cited forbidding the entry and grant of lands within the boundary of lands of the Cherokee Indians, nor is any reference made in it to such lands. That county was simply created on a footing with other counties of the State as to the entry of lands, except that it embraced all the lands of the Cherokee Indians in this State, as, perhaps, the counties of Rutherford and Burke did, to some extent, before that county was created. It is very questionable whether such strained interpretation of this statute could be allowed, encouraged by strong attending circumstances favoring it; but the discovery of a statute, presently to be mentioned, has relieved us from deciding that it could or could not be.

There are several collections of the older statutes of this State. All of them are more or less imperfect. Some give but a summary of the statutes, while others give such parts of them as were deemed important. The citations in all the collections are more or less complicated and confused. It is not, therefore, surprising that it is sometimes difficult to find an old statute that long since ceased to be current, and yet it continued to be important and effectual in some connections

and for some purposes. Being strongly impressed with the belief that there was some enactment shortly after the State acquired the lands, the Indian title to which was extinguished by the treaty of Holston, we have, in addition to the industrious research of counsel for the like purpose, scrutinized all the statutes passed after the year 1791, and have found one, consisting of four lines, that extended the provisions of another prior statute, and thus, by clear implication, intentionally subjected the lands in question to entry and grant. It is singular, that so large and important an acquisition of lands by the State was not made the subject of express legislation. They seem to have been neglected by the Legislature for a long while, but to have been watched by a few persons, who obtained grants for much the greater part of them, a single grant, in some instances, embracing hundreds of thousands of acres. The grant in question embraced two hundred and fifty thousand two hundred and forty acres. Why these lands were not regarded with more seriousness by the Legislature is left largely to conjecture. It may be, it supposed they were on a footing with other lands of the State subject to entry and grant, but this could not be so in the face of express statutory provisions forbidding the entry of them, while such provision remained without repeal or modification by statutory provision.

The statute (Acts 1784, 1 Pot. Rev., ch. 202) required that surveyors, in the "eastern part of the State," should survey for any person or persons whomsoever, his or their entries of land already made or that hereafter may be made in or adjoining any of the great swamps (be the number of entries more or less), in one entire survey, &c., * * * and, "that when two or more persons shall have entered, *or may hereafter enter* lands, jointly," &c., "the surveyor may survey two or more entries as one," &c. The provisions of this statute were afterwards extended by the statute (Acts 1794, 1 Pot. Rev., ch. 422; Haywood's Manual, p. 188), which provided as fol-

lows: "*Be it enacted, &c.:* That all the lands in this State, lying to the *eastward of the line of the ceded territory*, shall be deemed and considered as coming within the meaning and provision of the said act."

By "all the lands in this State lying to the eastward," &c., is meant all the lands of this State not specially devoted to some particular purpose, and the implication intended was, that they should be subject to entry and survey just as were the lands mentioned in the statutes amended. Such lands—"all the lands in this State lying," &c.—were to "be deemed and considered as coming within the meaning and purview of said act," that is, they were all deemed alike subject to entry. Otherwise, a part of the land would be excepted from the act, and this the express and sweeping words employed would not allow. And it seems that, particularly, there was a purpose to embrace the lands so acquired from the Cherokee Indians. Hence, the words, "lying to the eastward of the line of the *ceded territory*." That was the line which separated this State from the territory ceded by it to the United States (Acts 1789, 1 Pot. Rev., ch. 297), which now forms the State of Tennessee, and the land acquired from the Indians, by the treaty of Holston, lay immediately to the eastward of a part of that line. If the purpose of the brief statute just recited had been to omit this land, the proper language would have been, "all the lands in this State subject to entry," and the words, "lying to the eastward of the ceded territory," would have been omitted. These words were used advisedly, it seems, and intended to have force, and serve the purpose we attribute to them in connection with the other words employed.

This interpretation is strengthened by the fact, that the county of Buncombe had been created before that statute was enacted (Acts 1791, ch. 52), embracing the Indian lands, and it had an entry office like other counties of the State. The State owned these lands, having acquired them through the United States by the treaty of Holston, and they had

not been devoted to any particular purpose. They were vacant and might be disposed of as the Legislature might direct. Moreover, the statute (Acts 1809, Pot. Rev., ch. 774), seems to imply that the lands so acquired had theretofore been subject to entry and grant, as it expressly provided "that the land lying west of the line run by Meigs and Freeman, within the bounds of this State," (and we add immediately west of the land so acquired by this State) "shall not be subject to be entered under the entry laws of this State," &c., and other subsequent statutes seem to have had the like implication, making no mention of the lands now referred to.

It was certainly understood among the people and the authorities of the State after 1794, that the lands thus acquired from the Indians were subject to entry and grant. So far as we are informed and can learn from the most diligent search and scrutiny, made by counsel and the Court, there is no statute, other than that we have referred to, that allowed such entry and grant. It has not such clearness and directness as it might, not unreasonably, be expected to have; but we think the interpretation we have given it is reasonable and the proper one. We may add, that it is fortunate that it has been discovered, as it rendered the land subject to entry and makes valid and sustains the grant in question, under which, no doubt, many excellent people derive title to their land. We are glad to correct an error attributable to the singular character of the statute pertinent, and the unavoidable embarrassment encountered in finding it among a vast number of very old uncurrent statutes.

The prayer of the petitioners must, therefore, be granted. The case must be reheard, and the judgment of this Court, entered therein at the September Term of 1888, must be set aside, and judgment entered declaring that there is error, and directing a new trial to be had.

Prayer of the petitioners granted.

J. M. RICE v. J. R. JONES, Adm'r, et al.

Supplemental Proceedings—Res inter alios.

The maker of a note was examined in a supplemental proceeding, brought against the payee, and upon such examination admitted that he owed the payee the amount of the note. An order was made that a part of the money due on the note be paid to the plaintiffs in such proceeding, with which order the maker complied. At the time the proceedings were commenced the payee in the note had already transferred it *bona fide*, and before maturity, to A, who was never made a party to the proceeding: *Held*, that A could recover from the maker, in a separate action, the full amount of the note, with interest and costs, as it was the maker's folly to admit owing the note to the payee before ascertaining whether the note had been negotiated; and A not being a party, all that was done in the supplemental proceeding was *res inter alios* as to him.

CIVIL ACTION, tried at December Term, 1888, of the Superior Court of BUNCOMBE County, before *Merrimon, J.*

The following is a copy of the material part of the case settled on appeal:

On the 11th day of December, 1882, R. R. Jones, the intestate of the defendant J. R. Jones, executed his promissory note, under seal, to John S. Rice for three hundred dollars, to be due on the first day of August, 1883. In July, 1883, certain judgment creditors of John S. Rice instituted proceedings supplementary to execution against said John S. Rice, and caused to be issued from the Superior Court of Buncombe County, wherein the same had been begun, a notice of an order therein made, requiring said R. R. Jones to appear before the Clerk of the Superior Court of Buncombe County, at a time and place named, to answer concerning his indebtedness to said John S. Rice, and said notice to be immediately served upon said R. R. Jones; and in obedience to said order said R. R. Jones appeared before

said Clerk on the 21st day of August, 1883, and on oath made answer in writing as follows: "That he borrowed from the said John S. Rice, on or about the 11th day of December, 1882, the sum of three hundred dollars, for which he gave his note, secured by a deed of trust, to be due the 1st day of August, 1883, and that the same has not been paid, and that he is ready to pay the same according to order of Court. * * * That since he has been summoned in this cause (the supplemental proceedings) the note has been presented to him by Marion Rice (plaintiff in this action), brother of John S. Rice, claiming it to have been transferred to him, the said Marion Rice." Afterwards, on the 31st day of August, 1887, said R. R. Jones amended his said answer in said supplemental proceedings by adding thereto the following: "By leave of Court, R. R. Jones, amending this, his answer in these cases, demands: That if it shall be adjudged that R. R. Jones pay to any person or persons in these actions, or in either of them, any sum or sums of money, his, the said R. R. Jones' notes, in the answer mentioned, may be delivered up to him, and a deed of trust, given by himself and wife to secure the same, may be ordered to be cancelled, and that such other orders may be made by the Court as are necessary for his protection, and alleges that he has now of the money mentioned in his answer only two hundred and one dollars and forty-five cents, heretofore condemned."

Before said R. R. Jones made this amendment to his said answer, the Clerk of the Court had made an order based upon his original answer, in words and figures following, to-wit: "It is considered by the Court, upon the examination of R. R. Jones, and it is hereby adjudged, that the sum of two hundred and one dollars and forty-five cents of this three hundred dollars due from the said R. R. Jones to the said John S. Rice be, and the same is hereby, condemned to the use and satisfaction of the judgments, and that said R. R. Jones is hereby directed to satisfy the said judgments as herein

stated, and that he is prohibited from paying a sum sufficient to satisfy the said judgments, to any other person. August 21, 1882. E. W. Herndon, Clerk Superior Court."

From this order John S. Rice appealed, in words and figures following, to-wit:

"From the foregoing judgment John S. Rice appeals to the Superior Court in term, before the Judge. Notice of appeal given in open Court, August 21, 1883. E. W. Herndon, Clerk Superior Court." But such appeal was not heard until the present term of this Court, when, upon an issue submitted to a jury in this action, it was found that said note was the property of said J. M. Rice, having been assigned to him before said supplemental proceedings were begun. Upon this verdict the order made by the Clerk, on the 21st of August, 1883, was vacated and set aside. The issue as to the title to the note was one between a receiver, appointed by consent in the said supplemental proceedings, at this term, and the plaintiff in this action, J. M. Rice, by consent of the receiver, was allowed to intervene in this action and to make up an issue as to the ownership of the note sued on—this to be without prejudice to defendant. After this issue was determined by the jury in favor of the plaintiff, the defendants in this action agreed that the plaintiff was the owner of the note.

On the 27th of August, 1883, said R. R. Jones paid said J. M. Rice (Marion Rice) all of said note except the sum of two hundred and one and forty-five hundredths dollars, and this amount so paid was entered by said J. M. Rice as a credit upon the back of the note. It was set forth in said entry that the sum thus paid was the principal and interest of said note, except the amount for which R. R. Jones had been garnisheed in said supplemental proceedings.

On the 6th day of March, 1885, J. M. Rice began the present action in this Court, against said R. R. Jones and wife, and S. H. Reed, the trustee in the deed of trust made

to secure said note to John S. Rice, which deed of trust was executed on December 11th, 1882, to compel the trustee to sell the land in said deed of trust mentioned, in order to the payment of the remainder of said note. The pleadings in this action will go up as part of the case on appeal. R. R. Jones was at all times ready to pay the said note, always keeping in bank, for that purpose, the amount of money, upon which he received no interest or profit, and of which he made no use, but his money was at all times under his own control and subject to his own order. He never paid or offered to pay said money into Court, otherwise than as stated in his affidavit in said supplemental proceedings and in his answer in this action; nor did he take any steps in said supplemental proceedings to have J. M. Rice, the plaintiff in this action, whom he knew claimed to be the owner of said note, substituted in his place, nor did he at any time, in this action, seek to have the creditors, at whose instance said supplemental proceedings were begun, substituted in his place. J. M. Rice was never made a party to said supplemental proceedings at the instance of R. R. Jones, but he was summoned in said proceedings on the 27th day of May, 1885, after this action was begun, to answer concerning his indebtedness to John S. Rice.

When this action was called for trial the defendants insisted that it ought to be dismissed: first, because the plaintiff could not maintain such action pending such supplemental proceedings and injunction; secondly, because the Court had not jurisdiction of the action; and they contended further that the plaintiff was not entitled to interest during the injunction, nor to recover costs. The Court was of opinion that the plaintiff was entitled to bring his action; that the Court had jurisdiction; and that, as the defendants did not insist upon having any issues tried by a jury, but consented that the Court might act upon the facts found by

the Court, the plaintiff was entitled to recover, and gave judgment accordingly. The defendants excepted to the judgment as follows:

1. Because the Court gave judgment in favor of the plaintiff and against the defendants as set forth.

2. The plaintiff cannot maintain such action begun, pending such supplemental proceedings and injunction.

3. The Court had not jurisdiction of the action.

4. The Court should not have allowed the plaintiff interest on said sum of money during the injunction.

5. The Court should not have allowed the plaintiff costs herein.

6. The Court should have dismissed said action.

There was judgment for the plaintiff, from which the defendants appealed to this Court.

Mr. Charles A. Moore, for the plaintiff.

Mr. F. A. Sondley, for the defendants.

MERRIMON, J. (after stating the facts). It appears that the promissory note sued upon was indorsed to the plaintiff before it matured, and that he was the owner thereof. He was, therefore, entitled to recover the balance of the money due upon it—more than two hundred dollars—in this action, unless, as contended by the appellants, the proceedings had, affecting the maker thereof, in the proceeding supplementary to the execution mentioned, interfered with and obstructed the plaintiff's right to maintain the action. Hence, it is necessary to ascertain what relation the maker of the note sustained to this proceeding, how he was affected by it, and how, through him, it affected, indirectly, if at all, the rights of the plaintiff.

Now, John S. Rice was the payee of the note sued upon, and he was also the judgment debtor and defendant in the proceeding supplementary to the execution. The maker of

this note, as his supposed debtor, was required to appear before the proper Court at a time and place specified, to answer concerning his indebtedness to the payee thereof, as allowed by the statute (*The Code*, § 490). The purpose of such appearance and answer was to ascertain whether he owed such judgment debtor the note mentioned, or any sum of money. If it appeared that he did, then the Court might have ordered that such indebtedness, or so much thereof as might have been necessary, should be applied to the satisfaction of the judgments against the judgment debtor, as allowed and required by the statute (*The Code*, § 493). If, however, he denied in his answer that he owed the judgment debtor the note, or any sum of money, then the receiver appointed, or to be appointed in the proceeding against the judgment debtor in such cases, as prescribed by the statute (*The Code*, § 494), might have brought his action to recover the money alleged to be due upon the note or otherwise. *Coates* v. *Wilkes*, 92 N. C., 376; *Coates* v. *Wilkes*, 94 N. C., 174; *Turner* v. *Holden*, *ibid.*, 70; *Vegelahn* v. *Smith*, 95 N. C., 254.

In an action thus brought by the receiver, he could not recover, against an alleged debtor, money alleged by him to be due upon a promissory note, unless he should allege and prove that the note outstanding was still due and owing, at the time he brought his action, to the judgment debtor because, as the note was negotiable, it might, in good faith, have passed into the hands of some other person before the order forbidding the transfer of the judgment debtor's property. Indeed, this would be so as to any debt that might be assignable by indorsement or otherwise. The receiver could only recover debts due and owing to the judgment debtor, and the burden is upon him to show that the debt he demands judgment for is so due, whether the same be due by promissory note or otherwise. If the maker of such note is sued upon the same by a receiver, he should be careful not to admit, incautiously, that it is due and owing to the

payee thereof, or the judgment debtor, because, it may be that the latter has sold it to some other person, and he is not bound to give the maker notice that he has done so. If the maker should make such admission, and judgment should be obtained against him by the receiver, it would not at all protect him against a recovery on the same account by the owner of the note in an action brought by him for that purpose, unless he was a party to the action of the receiver. The real owner of the note could not be prejudiced, much less concluded, by a judgment against his debtor founded upon his note, in an action to which he was not a party, nor do orders of restraint or injunction affect him, unless in some way he is a party to it, except so far as to prevent him from interfering with property of any kind *in custodia legis*.

The maker of the note (the subject of this action), who is the intestate of the defendant and appellant J. R. Jones, administrator, in his answer, made in his life-time, in the proceeding referred to, did not deny that he owed the note in question to the judgment debtor therein; on the contrary, he, in substance and effect, admitted that he did owe it to him, and, thereupon, the Court made an order applying so much of the money due upon it, or as was necessary to the satisfaction of the judgments against the judgment debtor specified in the proceedings. He made such admission at his peril. He seems to have done so, supposing that the Court could and would protect him at all events against the plaintiff and the real owner of the note, whoever he might be. This was a serious mistake. The cautionary course open to him was to put the ownership of the note in issue by his answer, and in that case no order could have been made to his prejudice, but the receiver would have been driven to his action, as allowed by the statute (*The Code*, § 497), and to prove that the judgment debtor was the owner of the note as pointed out above. The maker of the note, when required to answer, was to a large extent affected by

the principles of law applicable to and much on the footing of a garnishee in attachment proceedings. *Myers* v. *Beeman*, 9 Ired., 116; *Ormond* v. *Moye*, 11 Ired., 564; *Shuler* v. *Bryson*, 65 N. C., 201; *Ponton* v. *Griffin*, 72 N. C., 362.

The plaintiff was not a party to the proceeding mentioned, and was not bound by it in any respect, so far as appears. The mere fact that he was required to answer concerning his indebtedness to the judgment debtor, did not make him a party—he was not required or summoned to appear for such purpose; nor was he required or expected to take notice of what others might answer or do in the proceeding. Indeed, it was not the purpose of the proceeding to litigate the rights of persons required to appear and answer, as to property of the judgment debtor and debts alleged to be due to him, and this denied, by the alleged debtors; this could and should be done in proper actions, brought by a receiver, appointed, in part, for that very purpose. *The Code*, §§ 494, 497.

The order directing the maker of the note to apply so much of the money due upon it as might be necessary for that purpose, to the satisfaction of the judgments specified in the proceeding, and forbidding him to pay such sum "to any other person," applied to him, and was founded upon his admission that he owed the note to the judgment debtor; it did not purport to apply to the present plaintiff, or to prohibit him from asserting any right he might have against the maker of the note, nor, indeed, could it affect him, if so intended, as he was not a party to the proceeding The Court had not jurisdiction of himself, nor control of his note, the subject of this action. Moreover, the statute pertinent (*The Code*, §§ 494, 497) did not authorize the Court to make such order applicable to and embrace property other than that of the judgment debtor. It is not its purpose to interfere with the property or rights of persons other than such debtor, or to delay or obstruct the enforcement of their rights, unless incidentally, in cases where the Court had

taken jurisdiction of the property and placed it *in custodia legis*. Of course, a person claiming property properly alleged to be that of the judgment debtor, would interfere with it in the face of an order of the Court forbidding interference with it, at his peril. If his claim were unfounded he might be treated as in contempt of the Court, and he would also be exposed to an action by the receiver appointed, or to be appointed, in the proceeding, in aid of its purposes.

We can see no just reason why the plaintiff is not entitled to interest on his debt. The note sued upon was his and he was in no default. The maker of it, when required to answer in the proceeding, should not have admitted that he owed the judgment debtor; he did so at his peril, and it was his folly that he did; he should have put the ownership of the note in issue, and if the Court had, in that case, made unwarranted orders, he should have appealed to the proper Court and had the errors corrected. In case of an action by the receiver as pointed out above, he might have required the present plaintiff to be made a party and had his rights settled and him concluded; and besides, in that case, the Court could and would, if need be, have afforded the maker of the note ample protection in some way allowed by law. The maker of the note seems to have thought, that inasmuch as he was required by the Court to answer in the proceeding against the judgment debtor, the Court could and ought, in any case or contingency, to afford him protection in all respects against the owner of the note, whoever he might be. This was a mistaken view of his right liability and duty. It was his duty to himself to require judgment creditors in the proceeding, in the way prescribed by law, to establish his indebtedness to the judgment debtor, and it was his default if he failed to do so. Pending the litigation, he continued to have the money not yet paid—it was his, and if he failed to use it profitably, it was because of his neglect or his misfortune, and the plaintiff should not be prejudiced by

his default or neglect as to interest. It is a part of the burden of every debtor to pay his debts certainly to him to whom it is due and entitled to have the money in discharge of the same. If sometime, in the complicated course of business, he finds it difficult and troublesome to ascertain to whom it is due, and to get a valid discharge of it, this may be his misfortune and a necessary evil incident to business transactions. Any incidental loss is his, if the creditor is in no default. In the present case the creditor was in no default—the maker of the note had notice of who he was, and instead of paying the debt to him, improperly admitted that the debt was due to the judgment debtor, believing, no doubt, the order of the Court would be his sufficient protection. And so it would be in the case presented, but it could not be in another and very different case. The Court is faithful, true and just in the enforcement of its orders and judgments in every case, but the extent and compass of these orders and judgments, and their effects, depend materially upon the facts upon which they are founded and rest. If the facts admitted or made to appear from evidence produced, are, indeed, not facts, then the Court cannot make the order on judgments apply to and embrace other and different facts or cases. Nor was there the slightest reason why the plaintiff was not entitled to costs. He had a good cause of action, and was properly allowed to recover—no sufficient reason was shown why he should not, and he was entitled to costs, as a lawful consequence. An issue of fact, by consent of parties, was irregularly interjected into the case and tried, but the finding upon it was in favor of the plaintiff. So far as appears, there was nothing in this that deprived the plaintiff of costs in the regular course of the action.

We think that the numerous authorities cited and relied upon, in the interesting brief of the counsel for the appellants, are not applicable to this case. Those of them deemed most

nearly pertinent are cases where the property in question was certainly in the custody of the law—there had been levies upon it in attachment proceedings. In some such cases the owner of the property could not be allowed to interfere with it pending such custody, unless in some cases he might intervene, by appropriate proceeding. In this case there was no levy upon the property; nor was the note, the subject of this action, in the custody of any party to the proceeding; nor did or could the appropriate order of the Court in the proceeding against the judgment debtor apply to persons who did not have property of the latter; nor did or could it properly forbid the owners of promissory notes, properly and in good faith indorsed by the judgment debtor when he might do so, from suing upon the same, certainly not, unless such persons were in some way made parties to the proceeding. Perhaps, the plaintiff might have intervened in the proceeding mentioned. Perhaps, he might have been brought into it in some way that might have brought about a settlement of his rights, or have concluded him as to the note, but he was not bound to assert his rights in and by it. He had possession, and was the owner of the note sued upon in this action, and there was no imperative reason why he should seek his remedy against his debtor in the proceeding, simply because the latter had been required to appear in it and answer as to his indebtedness to the judgment debtor. It was the duty of the maker of the note, to himself, to take care in the proceeding, and be sure to require the receiver to establish his indebtedness to the judgment debtor, or fail in his action.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

D. C. MOFFITT v. THE CITY OF ASHEVILLE.

Municipal Corporations, when Liable for Damages—Prisons, Duties and Liabilities of Cities and Towns with reference to—Constitution, Art. 11, § 6—*The Code*, § 3464—*Evidence; Examination of Experts.*

1. When cities and towns are acting (within the purview of their authority) in their *ministerial or corporate character in the management of property* for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipality. But where they are exercising the *judicial, discretionary or legislative authority* conferred by their charters, or are discharging a duty imposed *solely for the public benefit*, they are *not* liable for the negligence of their officers, unless some statute subjects them to liability for such negligence.

2. Under the Constitution, article 11, § 6, and *The Code*, § 3464, a city is liable in damages only for a failure to so construct its prison, or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things necessary, as to secure to prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the Aldermen of a city comply with the above requirements, the city is not liable in damages for sickness and suffering endured by a prisoner, and caused by the neglect of the *jailer*, *policemen* or *attendants*, to properly minister to his wants and necessities.

3. The word *superintendence*, as used in the Constitution, article 11, § 6, was intended to impose upon the governing officials of municipal corporations the duty of exercising ordinary care, in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates.

4. Where window-glass in the window of a city prison has been broken and the bed-clothing furnished for its inmates has been destroyed, but the *governing officers* of the city are not shown to have had actual notice thereof, or to have been negligent in providing such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure, in discharging the duties of construction or superintendence of the prison, as to subject the city to liability for injuries sustained by a prisoner by reason of the broken window, &c.

5. *Semble*, that a city or town would be liable for retaining incompetent or careless jailers or servants, after notice of their character.

6. *Lewis* v. *City of Raleigh*, *Burch* v. *Edenton*, and *Threadgill* v. *Commissioners*, distinguished from this case and approved.

7. The rule laid down in *State* v. *Bowman*, 78 N. C., 509, for the examination of expert witnesses, approved.

This was a CIVIL ACTION, tried at the June Term, 1888, of the Superior Court of BUNCOMBE County, before *Boykin*, *J.*

The complaint is as follows:

"The plaintiff, complaining of the defendant, alleges:

"1. That the defendant is a municipal corporation, created by the laws of the State of North Carolina.

"2. That as such corporation it became the duty of defendant to provide proper facilities for heating the city prison so as to secure the health and comfort of prisoners confined therein.

"3. That on the night of the ____ day of _____, 1887, the plaintiff was arrested by the police authorities of said city of Asheville, for an alleged violation of an ordinance of said city, and confined in the city prison until a late hour of the following morning. That the night on which he was so confined in said prison was one of intense coldness and severity. That the room in which plaintiff was confined was situated on the third floor of the building, and a number of window-panes on opposite sides of the room were broken out, so that a strong current of bitterly cold wind passed through the room during the entire night. That there

was no fire, bed or other means provided for heating said room or protecting plaintiff from the inclemency and severity of the weather.

"4. That by reason of plaintiff's confinement in said prison, as aforesaid, and exposure incident thereto, he was forced to endure the most intense physical suffering. That his body was so benumbed and chilled that he was scarcely able to walk or to talk. That in consequence of said exposure plaintiff contracted a most violent case of fever, from which he was confined to his bed for the period of eight weeks. That during said sickness he suffered the greatest agonies, and his life was almost despaired of for weeks, and that he has not since fully recovered his health, and is advised and believes he never will. That he was forced to pay large sums of money for medical treatment while suffering with said disease, viz.: the sum of one hundred and fifty dollars.

"5. That by reason of the aforesaid wrongful act of defendant, and the expenses aforesaid, the plaintiff has been greatly damaged, viz.: the sum of five thousand dollars.

"Wherefore, plaintiff demands judgment for the sum of five thousand dollars and the cost of this action."

The answer contained a general denial of facts alleged in every paragraph of the complaint. The issues and responses of the jury were as follows:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint?" "Yes."

"2 Did the plaintiff contribute to his said injury by his own negligence?" "No."

"3. What damages, if any, is the plaintiff entitled to recover by reason of said injury?" "$1,458.50."

The plaintiff introduced the following testimony:

Plaintiff, introduced as a witness for himself, testified as follows:

"In 1886 I lived in Madison County. On January 5, 1887, I came to Asheville to sell tobacco. That night I got into a difficulty and was put into the calaboose, and remained there all night. I was arrested at about 9 o'clok P. M., and put into the cage and locked up, and remained there until about 9 or 10 o'clock next morning. The officer that arrested me carried me before the Mayor, Judge Aston, and he tried me and fined me two dollars and costs. I paid it. There were no comforts in the jail and no fire or place to sleep to amount to anything. It was one of the coldest nights that I ever saw. I suffered a great deal. Nothing in there but one old blanket. Some of window lights were broken out. John Bell was confined with me. Next morning I was so cold I couldn't hardly walk down the steps; was cold all day. Had fever. Confined to my bed. After three or four weeks I was confined. Had cold. My head ached; unconscious a long time. Confined eight weeks in house and to bed three or four weeks. I am not as strong as I used to be, though my health is now good. I can't do the work I used to."

Cross-examined.—"I was intoxicated that night. I don't recollect having my coat off. I had been in and out of the bar-room nearly all day, after one o'clock. In the early part of the night, during my confinement in jail, I heard a roaring like a fire, but couldn't feel any warmth from it. I was sober then. I don't know that there was a drum in there. I didn't speak to Aston about suffering or being cold. I could talk pretty well next morning. I told the officer that I was so cold I didn't think I could walk down stairs. Do not know which officer it was. It was unusually cold weather. Before that I had been waiting on a sick man, staying around the house, etc. Had an aching in my head, shoulders, etc. I never had such a headache as that before. I was arrested for striking a boy in the bar-room."

George Bell, introduced by plaintiff, testified:

"I was in cage with plaintiff. It was coldest weather of the winter. We were in cage on third floor. Window-lights of room broken out. One old, torn blanket was there. No fire there. I called for fire. They said they had no wood. I told them I'd pay for it. I was never so cold in my life. The suffering was intense. I never suffered so much with cold in my life."

Cross-examined.—"I had cold to settle on my lungs. I had been gathering ice that day—superintending—I did not work at it. There was no fire in the room while I was there. I was drunk. I get drunk at times. I have been confined in the guard-house often. I like the city of Asheville, but did not like Aston, the Mayor at that time. I have paid several fines."

C. A. Nichols was introduced by plaintiff and sworn:

"I saw plaintiff next morning. His face was blue. He was very cold, and was suffering. I asked the policeman to let him out; told him I would go on his bond for his appearance at trial. Policeman said he couldn't do it until the Mayor came. He was confined in cage in upper story. I saw no fire; no evidence of fire; saw nothing but old blanket. It was very cold morning. Plaintiff was unwell almost all the time for six or eight weeks thereafter; had a very bad spell of fever."

Cross-examined.—"Moffitt was drunk. He gets drunk at times."

Dr. J. A. Reagan was introduced for the plaintiff and sworn—(witness admitted to be medical expert by defendant):

"I attended Moffitt on the 10th of January. On the 4th of February saw him. He was very sick; mind deranged. Had fever that had assumed typhoid form. Saw him several times. He was very dangerously ill from 4th to 20th of February. Cold or dampness is the most frequent cause

of catarrhal fever. I could not tell what caused this particular sickness."

Question: "If the jury find the facts as testified to, might they produce this disease?"

Objection by defendant. Overruled.

Answer: "They might."

Exception by defendant.

Cross-examined.—"Plaintiff is perfectly sound now, so far as I know. Intemperance in rioting and drinking would not produce this fever; the exposure might. A man drunk, with coat off, would require some time to contract cold. I told plaintiff, when I saw him in January, to go to bed, and that his condition required it to avoid fever, but he did not. There was, about that time, one case of same fever in neighborhood of plaintiff besides his, brought on by exposure. On January 10 plaintiff had pains in his head, shoulders, etc."

Plaintiff introduced several other witnesses, whose testimony tended to coroborate that of plaintiff and the other witnesses whose testimony is above set out.

The defendant offered the following testimony:

Captain F. N. Waddell, a witness for the defendant, testified:

"I am Chief of Police of the city of Asheville, and have been since 1885. I remember the night of the arrest. I arrested Bell. There was a fire kept in the police department in the prison. That night the stove was at a white heat. I directed the policemen to keep up a good fire. The windows were fully glazed on the outside and sealed up with inch plank closely on the inside; no lights were out. The fire was burning well at nine o'clock P. M., and the room was warm next morning where plaintiff was confined. The building is of brick. The cage in which plaintiff was confined was in the third story and south end of said building. There are three walls between it and the northern wall. There was a drum

in the room in which plaintiff was kept. The cage was close to the western wall, and the drum between it and the wall. The drum was connected by a pipe with the stove in the police headquarters. This headquarters was the room immediately beneath said cell, and is about twenty feet in height from floor to ceiling. There was plenty of coal on hand that night, and the night force of police, three officers, had no other fire with which to warm themselves but that in this stove. This heating apparatus had been in the cage-room, and the only method of heating it since I have been an officer of the city, and had always proved amply sufficient for that purpose. I had often been in the cell on very cold days and always found it comfortably warm. I had never heard any complaint from persons confined in there, that the heat was not sufficient for comfort, and no one made any complaint on the morning that the plaintiff was there, or at any other time to me or in my hearing, about it. On that morning I was there at eight o'clock, and the fire was burning well. I always saw to it that the room of cage was kept close, the cage well supplied with blankets, a plentiful supply of coal was on hand, and always, when there, kept good fires, and charged the policemen to do so when I was absent. The stove did not burn wood, but coal. I left about ten o'clock on the night of plaintiff's confinement, and there was a good fire then. There were twelve or fourteen blankets in the cage-room that night, just in front of the cage-door. I saw plaintiff next morning when brought into court, and could not see that he was suffering from cold; he did not appear numb and made no complaints whatever."

Cross-examined.—"I was inside of the cage-room and cage early that morning and it was comfortable. Captain Price, Mr. Adams and Mr. Hunter were there on the night force."

C. J. Harkins, a witness for defendant, testified:

"I was a policeman in January, 1887, in Asheville. The guard-house was in good condition. There was a stove below on the next floor, and a drum was in the cell-room in which plaintiff was, between the cage and wall. We generally kept blankets up there. Sometimes drunken men would tear them up. There were plenty of blankets there that night. There were no lights out of the windows, and they were ceiled up on the inside with inch plank. The room was of ordinary size. I never heard any complaint of the heating apparatus. Had been policeman several years at that time. Heard no complaint from plaintiff when he came out and went before the Mayor. The policemen of the night force had no other place to warm themselves than by the stove in the police headquarters, which heated the drum. I always found that the drum worked well, and when I was on the night force we always kept a good fire. On that night there was a good fire in the stove when I left at nine o'clock. It was warm next morning when I went on at about eight o'clock, in the room where the stove was, and there was a good fire in the stove."

William Adams, a witness for defendant, testified:

"I was a policeman of the city of Asheville in January, 1887, and had been for several years. I arrested the plaintiff between five and six o'clock in the evening. He was drunk and had struck a boy in the bar-room. The jail was in a good condition. The windows of the third floor, where the plaintiff was confined, were closely planked up. I did not notice glass from outside particularly, but had any been out I think I should have observed it, and I did not see any out. There was a pile of blankets, about seven or eight, on a chair in the cage, in front of the door, when I put the plaintiff in. The drum made the cage and cage-room comfortable. I was often in there on cold days and it was always comfortably warm. There was a good fire at nine o'clock that night when I left, and a good fire when I returned next

morning. I took plaintiff out and heard no complaint. The room was then comfortable, and so was cage. I was present at the trial before the Mayor and could not see that plaintiff was suffering any. He made no complaint. I never heard any complaint of the heating apparatus in the cell-room. There was plenty of coal in the room below the cell, where the police headquarters were, and the stove there, which heated the drum in the room above, was the only place where the night-watch could keep warm throughout the night. Our orders were to keep a good fire there, and it was always done when I was on night force."

Capt. T. Price, witness for defendant, testified:

"I was a policeman of the city of Asheville in January, 1887, and had been for several years. I was on duty the night when plaintiff was in prison. There was a good hot fire in the police headquarters all night, and the drum heated well the room above. There was plenty of coal there, and the stove burned coal. The windows in the room above were ceiled up with plank If any glass were out of the windows outside this ceiling, I did not notice it, and I am confident that I should have done so had such been the case. No one complained in my hearing of a lack of fire, and from the police headquarters below I would have heard easily any complaint. Never heard any complaint of heating apparatus, which was same during my connection with force. My own observation in the cage and cage-room was, that it was ample, and I often was in there in all sorts of weather. Had there been a lack of sufficient blankets I should have known it, and I knew of nothing of the sort. The cage-room was twice the size of the police headquarters. There was no other place, for night police to keep warm, but the stove that heated the drum. We always kept a good fire in cold weather. Am not now connected with city."

Thomas Hunter, witness for defendant, testified:

"I was a policeman of the city of Asheville in January, 1887, and had been for more than a year. I was on the night force, and on duty the night of plaintiff's confinement. It was our duty to keep up the fires, and we always did when the weather was cold. We had a good supply of coal on hand that night, and kept a good fire all night. There was no complaint from anybody. We had no other way of keeping warm ourselves but by the stove in the police headquarters, which heated the drum above. I was in the cage and cage-room every half hour that night, and the cage and cage-room were always warm. The drum was sufficient to heat them, and did heat them that night; no one would suffer there. There were plenty of blankets in the cage where plaintiff could get them. The windows were fully glazed and ceiled up inside with plank. There was no complaint that night or next morning, and I never heard any complaint of the heating apparatus, which was the same during my connection with the force. I am not now connected with the city government. There was no such conversation as that related by George Bell. He made no complaint to me or request of me, nor to any of us."

C. A. Smith, a witness for defendant, testified:

"I am a policeman of the city of Asheville, and was such in January, 1887. I was on duty the night of plaintiff's confinement; was in and out all night; came in every half hour during night. The stove was pretty much red-hot all night. The drum always heated well the cage and cage-room; never heard any complaint of it. We had plenty of coal on hand; stove burns coal. Bell had no conversation with me, or in my hearing, nor did plaintiff. Neither complained in my hearing. There were plenty of blankets in cage—five or six or seven of them. These windows of prison room were glazed without and closely planked up within. No one offered to buy wood or complained of cold. The stove was the only place where we could warm ourselves."

Cross-examined.—"I saw blankets in the cage that evening and the next morning. It was a pretty cold night. The cage-room was comfortable next morning. I went in there."

Jonathan Nowell, a witness for defendant, testified:

"I am in charge of city prison, and feed and attend to wants of prisoners. Had my same place in January, 1887, and had had it for several years. The prison was formerly the county jail of Buncombe County, until about two years before that time, the county authorities built another jail and sold this one to the city of Asheville. For four or five years before this sale, I had held the same position for the county that I now hold for the city, namely, to feed and wait upon the prisoners. During the entire time of my connection with this prision, both for county and city, the apparatus for heating this cage and cage-room was the same. I never at any time heard any complaint whatever that it did not warm the room and cage comfortably. I left at seven o'clock. There was a good fire there then, and plenty of blankets in the cage, immediately in front of the door and within a few feet of the prisoners, in easy reach. When I returned next morning at five o'clock, I was in cage. It was comfortable in there then and there was a good fire below. The window-lights were all in and the windows closely planked up with inch plank on the inside. This had been done during the preceding fall. There was a pile of blankets in the cage several feet high. No one complained in my hearing. The plaintiff showed no signs of cold when before the Mayor, and made no complaint. The officers had no place to warm except by the stove which heated the drum. The drum always kept the cage and cage-room warm. I was in there frequently every day. If any one but me and police were in room except prisoners, I do not know it, but would have known it."

Cross-examined.—"The weather was very cold that night.

When I opened the cage-room next morning I felt the warm air rush out. It was warm in there."

H. S. Harkins, witness for defendant, testified:

"I am now Mayor of the city of Asheville, but was not in January, 1887. I remember the evening of plaintiff's arrest. I went into a bar-room to see the proprietor on some business. It was a very cold day. Plaintiff was in there with his coat off, much affected with liquor. There had been a fire, but it had gone down. A boy was renewing it when plaintiff, from behind, without any provocation, or a word with the boy, struck him a severe blow, and was about to repeat the blow, when I interferred and prevented it. Plaintiff was then arrested. I was for more than a year Chief of Police of the city. This was before. I never heard any complaint of the stove and drum being insufficient to heat comfortably the cage and cage-room. I know that it did heat them very well. I know the general characters of C. J. Harkins, William Adams, F. N. Waddell, Capt. Thomas Price, Thomas Hunter, C. A. Smith, Jonathan Nowell, and they are good."

E. J. Aston, a witness for defendant, testified:

"I was Mayor of Asheville in January, 1887, and had been for about three years. I remember the day of plaintiff's confinement. I tried him. He made no complaint to me of suffering. I heard of no complaint. I saw no sign of suffering. The heating apparatus of the cage and cage-room had always proved sufficient. It was there when the city bought jail, and remained there during my terms of office. I was often in cage in all kinds of weather, and always found it comfortable. I was always particularly attentive to the prison, and gave repeated instructions to police to keep it comfortable, explaining that men were put in there only for safe-keeping, and should be carefully attended and provided with comforts. I never heard any complaint from anybody, that these instructions had been

neglected in the least particular. There was a plentiful supply of coal, the only fuel used, on hand at the time mentioned, and the windows were closely ceiled up on the inside. I had had them thoroughly glazed and so ceiled up the preceding fall. I do not know that any of the glass were out at this time, but had there been I am confident that I should have observed it, since I was there frequently every day and could easily have seen it. There were plenty of blankets on hand at the time, most of them recently purchased."

Dr. W. D. Hilliard, a witness for defendant, testified:

"I am a physician; graduate of medical college; was for some years assistant physician in Morganton lunatic asylum, and have practiced in Asheville for six years. Consider myself competent to give an opinion on catarrhal fever. A drunk man is more likely to take it than a sober man. Excess in eating or drinking may, with slight exposure, produce it If the jury should find that the plaintiff was drinking heavily, was in and out of a bar-room on a very cold day, and part of the time in the room when the fire was very low, with his coat off, think this much more likely to have produced catarrhal fever than confinement in prison over night, even if very cold. If the jury should find that the plaintiff, kept in a cold room in prison over night, on a very cold night, and suffered greatly from cold, I think, had this resulted in such fever, it must have reached a full development within a week, at the greatest, thereafter, and that if plaintiff was not confined to his bed for three weeks or more thereafter, it must, in all probability, have been from some other cause than the confinement, and could not, in my opinion, have been produced by the confinement at a time so long anterior Many times a very slight exposure will produce catarrhal fever, and it is often impossible to trace the cause."

This was all the evidence in the case.

The defendant asked his honor to charge the jury, as follows:

"1. That before the plaintiff can recover in this action he must allege and prove that he sustained an injury whereof the proximate cause was the negligence of the city defendant, or its authorities, and it has not been alleged, and there is no evidence that such negligence existed or was such proximate cause.

"2. If the jury shall find that the plaintiff contributed in any manner to his own injury, if any injury he sustained, either by drunkenness and walking in open air on a very cold night without his coat or by declining to obey the advice of his physician and go to bed, or in any other manner which the testimony may show, then he is not entitled to recover.

"3. The defendant was bound to use only ordinary care under the circumstances, and there is no evidence showing or tending to show any want of ordinary care on its part. If, therefore, the jury should find that the plaintiff was injured by the window-panes being out in the prison, they must, in order to render the defendant liable, show that this fact was known to the city authorities, or that the windows had been out for such a length of time as they would ordinarily have known it; and of these things there is no evidence. If the jury shall find that there was no coal or other fuel wherewith to build a fire sufficient, or that the fire built was insufficient to warm the room, or that the machinery provided for warming the room was insufficient for that purpose, they must further find, in order to render the defendant liable, that these things were known to the city authorities a sufficiently long time beforehand to enable them to remedy the same; and of this there is no evidence. If the defendant supplied in the cell, where it is alleged the plaintiff was confined, blankets in sufficient numbers to provide for plaintiff under circumstances which might reasonably have been anticipated, the plaintiff would not be entitled to recover.

"4. The plaintiff must satisfy the jury by a preponderance of evidence, at least, that the injury he sustained, if any, was the proximate result of the negligence of the defendant, and if the jury shall be of opinion that such injury was brought about, even in part, by the negligent acts of the plaintiff, whether in going about without his coat in cold weather, or otherwise, the plaintiff would not be entitled to recover, but in order to such recovery the jury must be satisfied by a preponderance of the evidence that the exposure of the plaintiff in the prison, and without his fault, was the sole cause of his injury, not in any way aided by anything else wherin the plaintiff failed to exercise ordinary care. The plaintiff must be without fault in that regard, and take such care of himself as a man of ordinary prudence would, in order to entitle him to recover The city can be liable to plaintiff in no event except for its own negligence. It cannot be liable for the tortious negligence of its police officers.

"5. If the plaintiff sustained an injury, by reason of the failure of the defendant to anticipate and provide against an extraordinary cold night, he cannot recover therefor. Before the plaintiff can recover for an injury, he must show by a preponderance of evidence that the injury was the ordinary, or probable, consequence of the act complained of.

"6. If the plaintiff might have avoided the consequence of the act of defendant, if such act existed, by the exercise of ordinary care, he cannot recover.

"7. If a wrong and resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated, as cause and effect, to support an action. It is not only requisite that the damage, actual or inferential, should be suffered, but this damage must be the legitimate consequence of the thing amiss. If an injury has resulted in consequence

of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that which was more remote."

His Honor refused these prayers for instructions, except as they are embraced in the charge given hereinafter, and the defendant excepted.

His Honor charged the jury as follows:

"The plaintiff must prove, by the preponderance of the evidence, that the injury that he sustained was the immediate and proximate result of the negligence of the defendant. It must appear from the testimony that the imprisonment of the plaintiff by the defendant, and the carelessness or neglect of defendant, or its agents, in providing sufficient bedclothing or properly heating the prison, or failing to supply the windows with panes, resulted in the injury which plaintiff alleges he has sustained. If there appears to be any cause independent of the conduct of defendant, and intervening between the acts and omissions complained of and the injury, to which the same may be referred and traced, the plaintiff cannot recover. If the injury is the natural and usual result of the act or omission of defendant, and the plaintiff be without fault himself, there may be a recovery. In determining the cause of plaintiff's injury the jury may consider whether the plaintiff exercised prudence and ordinary care, such as would suggest themselves to prudent and cautious men in the preservation of their health and bodies, and so conducted himself. If the injury may be attributed to the negligence of plaintiff upon the occasion referred to in imbibing intoxicating liquor excessively, and in exposing himself to the inclemency of the weather without suitable or necessary clothing, or if the said injury resulted from his inattention to his person after the imprisonment, the plaintiff cannot recover, except as hereinafter explained. The

plaintiff, however, can recover, though he was in fault himself to some extent, if the injury complained of could not have been arrested by the exercise of ordinary care on his part. When the negligence of the defendant is the proximate cause of the injury, and the negligence of the plaintiff is remote, consisting of some act or omission on his part not occurring at the time the injury is such, the plaintiff may recover. It is the duty of the defendant to provide for the comfort of its prisoners in a reasonable manner. It was its duty to furnish everything essential and necessary to accomplish this. These necessities must, of course, conform to the exigencies of the time and season. There must be proper ventilation, sufficient bed-clothing, suitable heating apparatus, operated as occasion may demand. The cell must be protected in such a manner as to prevent the inblowing of cold winds of winter. The prisoner must be treated in a humane manner. If the defendant has neglected its duty in respect of any of these requirements, and injury has been sustained by the plaintiff by reason thereof, he is entitled to be compensated therefor. The defendant would not be required to provide against unforeseen, unusual and extraordinary exigencies, such as might not be reasonably anticipated. If, therefore, the injury of the plaintiff may be attributed to circumstances attending his imprisonment, which could not have been reasonably anticipated and provided for by the defendant, the plaintiff could not recover damage. It was the duty of the plaintiff to conduct himself prudently, and if he did not do so, and failed to exercise ordinary care and prudence, the defendant is entitled to a verdict. If the injury sustained by the plaintiff resulted from the carelessness of the defendant or its officers, and its failure to provide sufficient and suitable means to insure his comfort and safety, then the defendant is responsible, and damages may be awarded to the plaintiff as a compensation, although the illness of the plaintiff may not have resulted

from the imprisonment as alleged, still the plaintiff would be entitled to compensation for any sufferings and pains he may have endured during the time of his incarceration by reason of the negligence of the defendant."

To this charge, as given, defendant excepted, and appealed.

Messrs. Chas. A. Moore and *M. E. Carter*, for the plaintiff.

Messrs. F. A. Sondley and *Theo. F. Davidson*, for the defendant.

AVERY, J. The liability of cities and towns for the negligence of their officers or agents, depends upon the nature of the power that the corporation is exercising, when the damage complained of is sustained. A town acts in the dual capacities of an *imperium in imperio*, exercising governmental duties, and of a private corporation enjoying powers and privileges conferred for its own benefit.

When such municipal corporations are acting (within the purview of their authority) in their ministerial or corporate character in the management of property for their own benefit, or in the exercise of powers, assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents, subject to their control, although they may be engaged in some work that will enure to the general benefit of the municipality. Shearman & Redfield on Neg., §§ 123 and 126; Dillon on Mun. Corp., 966 and 968; Thompson on Neg., 734; *Meares* v. *Wilmington*, 9 Ired., 73; *Wright* v. *The City of Wilmington*, 92 N. C., 156; Wharton Law of Neg., sec. 190; Meyer's Federal Decisions, vol. 10, sec. 2327. The grading of streets, the cleansing of sewers and keeping in safe condition wharfs, from which the corporation derives a profit, are corporate duties. Whitaker's Smith on Neg., 122; *Barnes* v. *District of Columbia*, 1 Otto, 540–557; *Treightman* v. *Washington*, 1 Black., 39; Wharton Law of Neg., sec. 262.

On the other hand, where a city or town is exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence. *Hill* v. *Charlotte*, 72 N. C., 55; *State* v. *Hall*, 97 N. C. 474; 2 Dillon Munic. Cor., secs. 965 and 975; *Dargan* v. *Mayor*, 31 Ala., 469; *City of Richmond* v. *Long*, 17 Grattan, 375; *Stewart* v. *New Orleans*, 9 La, 461; Wharton Neg., secs 191 and 260; *Hill* v. *City of Boston*, 122 Mass., 344; Shearman and Redfield Neg., sec. 129. As illustrations of the principle last stated, it has been held that a city is not answerable in damages for an assault with excessive force, committed by a police officer in the attempt to enforce a city ordinance, or for the negligent or unnecessary killing by a peace officer of a city, of one whom he is attempting rightfully to arrest. Many cases, illustrating by example the principle that municipal corporations are exempt from liability, when acting as agents of the State and exercising governmental power, will be found collected in *Donohue* v. *City of Brooklyn*, 51 Hun., 563 (Albany Law Journal, vol. 39, No. 17).

The plaintiff was arrested for an assault, committed in the presence of the peace officer of the city, who arrested him, and the officer was unquestionably exercising a right, in fact discharging a duty to the public. *The Code*, §§ 3808, 3810, 3811 and 3818; Pr. Laws of 1883, ch. 111, sec. 59.

The city of Asheville was not, therefore, answerable in damages to the plaintiff for any violence or negligence, on the part of its officials towards him, up to the moment when he was committed to the city prison.

When we follow the plaintiff across the portal of the prison we are confronted with the new question, whether there is any provision of law creating a liability (expressly

or by implication) on the part of the city for injury to the health of, or for the bodily suffering of, the plaintiff caused by the neglect of the city or its agents in the construction of the prison or the subsequent superintendence of it. Sec. 6, Art. XI, of the Constitution, and sec. 3464 of *The Code*, are as follows: Sec. 6, Constitution, Art. XI: "It shall be required by competent legislation, that the *structure* and *superintendence* of the penal institutions of the State, the county jails and city police prisons, secure the health and comfort of the prisoners," &c. *The Code*, sec. 3464: "The Sheriff, or keeper of any jail, shall every day cleanse the room of the prison in which any prisoner shall be confined and cause all filth to be removed therefrom; and shall furnish the prisoner a plenty of good and wholesome water, three times in every day; and shall find each prisoner fuel, one pound of good wholesome bread, one pound of good roasted or boiled flesh, and every necessary attendance."

Section 3465 of *The Code* imposes upon the County Commissioners the duty of purchasing "a number of good warm blankets or other suitable bed-clothes, which shall be securely preserved by the jailer and furnished to the prisoners for their use and comfort, as the season or circumstances may require."

It is not necessary to decide, whether the substitution in *The Code* of the term "keeper of any jail" instead of "keeper of any public prision," (in sec. 9, ch. 89, Bat. Rev., quoted in *Lewis* v. *Raleigh*, 77 N. C., 229), limits the responsibility of towns, or whether *jail*, as the generic term, includes every kind of prison, or whether section 3465 of *The Code* applies to police prisons at all.

The Aldermen of Asheville were vested with authority to erect a city prison by section 47, ch. 111, Private Laws 1883, if they did not have the power by implication under the general law in reference to towns; and when they built the police guard-house in the exercise of their power, the city

became as fully amenable for its proper structure and superintendence, as the General Assembly was required by the Constitution to make it answerable by competent legislation.

The defendant, in the discharge of its judicial duties, could not have incurred any liability in any view of the case but for the express provisions of the Constitution and laws. Dillon on Munic. Corp., sec. 975 (773); *Hill* v. *Charlotte, supra.*

By a well-known rule, therefore, the law, imposing this responsibility on such municipal corporations for the proper structure and superintendence of their prisons, must be construed strictly.

We hold that the defendant is liable in damages only for a failure, either to so construct its prison or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things necessary as to secure to the prisoners committed to it a reasonable degree of comfort and protect them from such actual bodily suffering as would injure their health.

If the Aldermen of the city built a reasonably comfortable police prison, and afterwards furnished to those who had immediate charge of it everything that was essential to prevent bodily suffering on the part of prisoners from excessive cold or heat or hunger, and to protect their health, the city would not be liable, even if the suffering or sickness of the plaintiff was caused by neglect of the jailer, the policemen, or the attendants to keep the fires burning all night, or to give the plaintiff the necessary bed-clothing furnished to them. Shearman & Redfield on Neg., sec. 139, and note (2).

The word superintendence means oversight or inspection, and was intended, as used in the Constitution, to impose upon the governing officials of a municipal corporation the duty of exercising ordinary care in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisons (so far, at least, as to replenish the supply of such necessary

articles when notified that they are needed), and of employing such agents and raising and appropriating such amounts of money as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. *Threadgill* v. *Commissioners*, 99 N. C., 352. The rule in reference to the liability of counties for torts is always the same as that which applies to cities and towns when exercising governmental duties. Counties are never answerable in damages for torts, unless made so by the provisions of some statute, either expressly or by necessary implication. *Bouditch* v. *Boston*, 4 Stiff., 323; Dillon on Munic. Corp., secs. 963 and 965.

In *Threadgill* v. *Commissioners, supra*, Chief Justice SMITH, for this Court, after laying down the rule that a county is required to provide money to repair public buildings, other than prisons, by the provisions of the *The Code*, § 707, subsections 5, 6 and 7, says: "The doctrine is, that while these corporate agencies must provide the means and employ the men to perform such duties, they are not personally and by their own labor to perform such menial service, and the default to make them liable must be in neglecting to exercise their authority in the use of labor and money for that purpose, and so it must be charged to make a cause of action against them." It is true that this language was used in reference to the liability imposed by *The Code* upon the Board of Commissioners, as representing the county, for a failure to have the public privies cleaned, and allowing them to become a nuisance.

But the reasoning and the principle apply to the general duty of building and overlooking prisons, imposed by the Constitution upon counties and towns in the very same language, and the statutes (*The Code*, §§ 3464, 3465) are, if there is any difference, more stringent as to the duty of County Commissioners and county jailers in providing and caring for pris-

oners in the county jails, than they are towards town authorities and keepers of police prisons.

However the general question of the liability of counties, by virtue of this legislation, may hereafter be settled, we may safely say that neither counties nor towns can be required, as a general rule, to answer in damages for injuries to prisoners caused by the neglect of their respective jailers, policemen or guards who may have immediate charge and custody of them, and of which the governing officials of the corporation had no notice.

We think that where window-glass in the window of a police prison has been broken and the bed-clothing furnished for its inmates has been destroyed, but the governing officers of the town are not shown to have had actual notice of the breaking or destruction, or to have been negligent in omitting to provide for such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure in discharging the duties of construction or superintendence as to subject the corporation to liability. We do not wish, however, to be understood as intimating that a city or town would not be liable, if it should retain incompetent or careless jailers or servants after notice of their character, for damages caused by their negligence, though the question is not directly presented in this case.

It naturally follows, from giving our sanction to the principles already stated, that we should hold that the Judge below erred in refusing to give the third instruction asked, and in telling the jury in lieu of the charge asked: first, "It must appear from the testimony that the imprisonment of the plaintiff by the defendant and the carelessness or neglect of the defendant, or *its agents*, in providing sufficient bed-clothing, or properly heating the prison, or failing to supply the windows with panes, resulted in the injury which plaintiff alleges he had sustained." Second: "If the injury sus-

tained by the plaintiff resulted from the carelessness of the defendant, or *its officers*, and its failure to provide sufficient and suitable means to insure his comfort and safety, then the defendant is responsible, and damages may be awarded to the plaintiff as compensation," &c.

Acting under the instruction given, it may be that the jury believed from the evidence that the sickness and suffering of the plaintiff was caused by the failure of the keeper of the prison to make a fire in a stove, though he had an abundance of fuel provided by the proper authorities of the city. The case of *Lewis* v. *City of Raleigh*, *supra*, was one in which the plaintiff was arrested for a violation of a city ordinance, which is made, by section 3820 of *The Code*, a criminal offence, and therefore it is very similar to this. But it is distinguishable in that the plaintiff Lewis was confined in a narrow cell, 8x14, located in a cellar under the market-house, with no window and no ventilation except a grate in the door that opened on an under-ground passage, with a window at one end, lighted through a grate on the sidewalk. Reviewing the admitted facts, Justice READE, for the Court, said: "It was an impossibility that such a place could 'secure health and comfort,' in the language of the Constitution, or that it could be 'clean,' in the language of the statute." On the trial below there was a great deal of testimony tending to show that the prison of the defendant was well constructed for health and comfort, and was provided with bed-clothing, fuel, stoves and every necessary to secure a reasonable degree of comfort and protect health. Counsel on the argument cited *Bunch* v. *Edenton*, 90 N. C., 431, in support of the contention that the evidence established the accountability of the defendant. The plaintiff there brought his action to recover damages for an injury caused by his falling into an excavation near the sidewalk in the town of Edenton. Justice MERRIMON, in delivering the opinion of the Court, adverted to the distinction we have drawn between the cor-

porate and governmental powers of a town, and cited *Lewis* v. *Raleigh*, *supra*, and *Hill* v. *Charlotte*, *supra*. The law required that the commissioners "shall provide for keeping in proper repair the streets and bridges in the town." *The Code*, sec. 3803. The Court, construing the law, said: "And proper repair implies also that all bridges, dangerous pits, embankments, dangerous walls, and the like perilous places and things very near, shall be guarded against by proper railings and barriers."

It is not necessary that we should pass upon the exception to the evidence of Dr. Reagan, who testified as an expert, yet we would suggest a careful examination of the rule laid down in *State* v. *Bowman*, 78 N. C., 509, in framing questions for the witness in any future trial.

For the error pointed out in the charge to the jury, the defendant is entitled to a new trial.

Error. *Venire de novo.*

J. L. LYLE, Adm'r c. t. a. of D. W. SILER, v. MARTHA J. SILER.

Records, Presumption in Favor of—Assignment of Errors—Administrators, Removal of—Mistake—Money Paid By.

1. The presumption is in favor of the regularity and correctness of the proceedings below, and error will not be presumed unless it is assigned and shown. Therefore, when it appears from the record, that, upon affidavit, the plaintiff obtained an order for service, by publication of summons, on a non-resident defendant, and that there was affidavit of the publisher of a newspaper that publication was made, this Court will not presume any defect in the service, in the absence of assignments specifying the particular defects here insisted on.

2. In a proceeding by an administrator against the non-resident widow of a decedent who had not, for several years after his death, applied

for letters of administration, she cannot be heard to say that the letters granted to the plaintiff were void, because she was the widow and had not waived her right to administer; at most, the appointment was only voidable and could be attacked only by a direct proceeding to remove the plaintiff.

3. When it appears that the appointment of the plaintiff as administrator was *void*, a defendant can avail himself of a plea of *ne unques executor*.

4. While a sum, which has been carelessly, voluntarily and without reasonable enquiry, overpaid as a legacy or distributive share, before the settlement of an estate, cannot be recovered by an executor or administrator; but when an overpayment was made to a legatee after the settlement of the estate, from which it was due, not officiously and voluntarily, but by *mistake* (of fact), the sum overpaid can be recovered.

This is a PETITION to obtain a license to sell land to make assets to pay debts of a testator. The pleadings raised issues of fact, and the proceedings were transferred to the Court in term and heard before *MacRae, J.*, at Fall Term, 1888, of the Superior Court of MACON.

The following are the material parts of the case settled on appeal:

"The petitioner put in evidence the will of Jacob Siler, with the probate and qualification of this plaintiff, J. M. Lyle, and of T. H. Siler, as executors thereof.

"The following facts are admitted:

"That plaintiff, J. M. Lyle, as executor of Jacob Siler, deceased, on the 16th of August, 1883, by mistake, overpaid to D. W. Siler, who was one of the legatees under the will of Jacob Siler, the sum of $92.87 as his share under said will.

"That said D. W. Siler lived out of this State since 1870, and died in December, 1883.

"That a final settlement was made by the executor of the estate of Jacob Siler on the 16th of August, 1883.

"That plaintiff, on the 13th day of December, 1887, took out letters of administration on the estate of D. W. Siler,

deceased, with the will annexed, no letters testamentary having been issued in this State before that time.

"That Martha J. Siler, the defendant, is the widow and devisee under the will of D. W. Siler, and lives in Washington Territory.

"The defendant contended that the granting of letters of administration to the plaintiff was void, for the reason that defendant had not waived her right to take out letters. Defendant further contended that on the evidence the plaintiff had shown no debt against the estate of D. W. Siler; that the overpayment to said Siler by the executor was an officious act, and that plaintiff was not entitled to recover it.

"The Court refused to instruct the jury to the above effect, and defendant excepted."

There was a verdict and judgment for the plaintiff, and the defendant, having excepted, appealed to this Court.

Mr. Theo. F. Davidson, for the plaintiff.
Mr. Chas. A. Moore, for the defendant.

MERRIMON, J. (after stating the case) The record in this case is not as full and satisfactory as it might and should be; and it fails to raise questions that seems the appellant intended to present. The presumption is in favor of the regularity and correctness of the rulings, orders and judgment of the Court, it being one of general jurisdiction, and the burden is on the appellant to show error. It is her laches or misfortune if she fails to do so when she can. We must accept and act upon the record as it comes to us. It is not our province to assign or perfect the assignment of errors. *Spillman* v. *Williams*, 91 N. C., 483, and the cases there cited.

The Sheriff returned the summons unexecuted because the defendant, the appellant, could not be found. It appeared that she was a non-resident of this State, and there was ser-

vice of the summons by publication. Counsel for the defendant made a special appearance, and moved to dismiss the proceeding "for the reason that the affidavit upon which the motion for an order of publication is made is defective." The Court denied the motion, and this is assigned as error. Neither the affidavit nor the substance of it is set forth in the record, nor is it stated wherein it is alleged to be defective. It appears by the record that, upon affidavit, the plaintiff obtained an order of publication, and the affidavit of the publisher of the newspaper that it was published, and thus there was service of the summons. The presumption, in the absence of anything appearing to the contrary except mere suggestion, is, that the affidavit and order of publication were sufficient, and the service by publication was properly made. If the affidavit was defective, the appellant should have set it forth in his assignments of error, and specified therein the particular defects insisted upon. The appellant contends that the letters of administration granted to the plaintiff were void, for the reason that she, being the surviving widow of the testator, had not waived her right to take such letters. This contention is without force.

It does not appear that she was named in the will as executrix thereof, or that any executor was appointed. It does appear that she was a non-resident of the State, and that for a long while, several years, she had failed to apply to be allowed to have such letters. Therefore, the appointment of the plaintiff to be such administrator was not void; at most, it was only voidable, and the objection that he had not been regularly appointed could not be successfully made in this proceeding. Steps should be taken in a direct proceeding for the purpose to remove him, to the end the proper person might be appointed. *Garrison* v. *Cox*, 95 N. C., 353, and the cases there cited. It would be otherwise, however, if the appointment had been absolutely void and this appeared. Indeed, when the appointment was so void, the

defendant might avail himself of the plea of *ne unques* executor.

The appellant further contended that the plaintiff's claim was not a valid debt against the estate of his testator, upon the ground that the overpayment mentioned to his testator "was an officious act." It was not contended that such overpayment was occasioned by a *mistake of law*, or that the plaintiff was not entitled to be paid the sum of money paid by mistake on any other ground than that it was paid officiously. It was admitted that it was by "*mistake* overpaid to D. W. Siler (the plaintiff's testator), who was one of the legatees," etc. That there was mistake and overpayments of money supposed to be due to the legatee, implies that such payment was not voluntary or officious. It was so paid because the parties supposed that it was due to the testator as part of his legacy, when in fact it was not. Moreover, it was so paid after the final settlement of the estate from which the legacy was due to the plaintiff's testator. It was admitted, certainly by implication, that the plaintiff should be paid as he claims, if the overpayment was not voluntary. *Pool* v. *Allen*, 7 Ired, 120; *Newell* v. *March*, 8 Ired., 441; *Adams* v. *Reeves*, 68 N. C., 134; *Commissioners* v. *Commissioners*, 75 N.C., 240.

This is not like the case when an executor or administrator, carelessly, negligently, and voluntarily and without reasonable inquiry, pays legacies or distributive shares before the estate is settled, and afterwards finds that he has overpaid the legatee or distributee and seeks to recover the sums overpaid. In such cases he cannot recover, unless he can show reasonable diligence on his part in ascertaining the condition of the estate, and special circumstances that reasonably mislead him in making such payments. This is so, because it is the duty of the executor or administrator to conduct and close the administration of the estate according to law, and it would be unjust and vexatious to mislead

and embarrass the legatee or distributee by paying his legacy or share and afterwards, he being in no fault, compelling him to repay what had been so paid to him. *Marsh* v. *Scarboro*, 2 Dev. Eq., 551; *Donnell* v. *Cooke*, 63 N. C., 227; *Bumpass* v. *Chambers*, 77 N. C., 357.

No error. Affirmed.

CHRISTOPHER STEPHENS v. FRANK D. KOONCE.

Trover, Action in Nature of—Tender and Costs under The Code, § 573—Interest, when discretionary with the Jury; all judgments bear under The Code, § 530.

1. In an action to recover damages for the conversion of personal property, the defendant has no right, under *The Code*, § 573, to force the plaintiff to accept the property, for the conversion of which he is sued, or pay costs; nor would defendant have such right in an action of claim and delivery, unless the tender of the property is accompanied by a proposal to pay an amount as damages not less than that ultimately assessed by the jury.
2. Although the allowance of interest, in an action for damages for conversion of property, is discretionary with the jury, yet *after the verdict* the judgment for the damages assessed bears interest by virtue of *The Code*, § 530; and this is so, although the verdict is for a certain sum "without interest."

This was a CIVIL ACTION, tried before *Philips*, *J.*, and a jury, at the Fall Term, 1887, of the Superior Court of ONSLOW County.

The action was brought to recover damage for the unlawful conversion by the defendant of "a steam engine, boiler and fixtures; also a cotton-gin, condenser, cotton-press, with fixtures," &c., alleged to be the property of the plaintiff.

The declaration in the complaint is in the nature of trover and conversion, and the demand is for money as damages.

The defendant, in his answer, sets up a number of defences. He states, in detail, in his first defence, the manner in which he acquired title as the owner to the property, which he admits he has converted to his own use. But it is not material for the elucidation of the question involved in this appeal to give even a summary of the answer.

The defendant insists that he made a tender, which is embraced in his answer, and that as the plaintiff failed or refused to accept the offer of compromise so made, the latter cannot, under the provisions of § 573 of *The Code*, recover costs after the date when the offer was so made. The portion of the answer relied on as sufficient tender, being the second defence, is as follows, to-wit:

"That if any trespass was committed by the defendant upon the real estate claimed by the plaintiff, and described in the first article of the complaint as the Miller plantation, situated in Richlands Township, in Onslow County, in removing said steam engine and boiler and saw mill, two belts and grist mill from said Miller plantation, the defendant, for himself, disclaims to set up any title to said lands in himself; and said trespass was involuntary on the part of defendant, and the defendant hereby disclaims any title to said steam engine and boiler, one saw, two leather belts, and one grist-mill, and hereby offers a judgment in favor of the plaintiff for the possession of said steam engine and boiler, one saw, two leather belts, and one grist-mill, and for other machinery described in the complaint (except one rubber belt and one chest of mechanics' tools), or for the sum of one and $\frac{80}{100}$ dollars, or about that amount, being the amount of defendant's bid for said articles, and for the costs of this action."

The issues, and responses to them, were as follows:

"1. Is the plaintiff the owner of the property described in the complaint, or any part thereof?" Answer, "Yes."

"2. Did the defendant unlawfully convert the same, or any part thereof?" Answer, "Yes."

"3. If so, what is the value of the property converted?" Answer, "Three hundred dollars, without interest."

It was alleged in the complaint that the property was wrongfully taken from the Miller plantation.

Messrs. C. Manly and *C. M. Busbee*, for the plaintiff.
Mr. S. W. Isler, for the defendant.

AVERY, J. (after stating the case). The offer made by the defendant in the answer, is not sufficient to subject the plaintiff to liability for costs for refusal to accept it. The plaintiff, in the exercise of an unquestionable right, elected to bring his action for damages for the conversion of certain property instead of an action in the nature of detinue, or in the nature of replevin, with the right to the ancillary remedy of claim and delivery. It is presumed that the plaintiff adopted the action for the recovery of damages, only with a view to some advantage, expected from pursuing his remedy to judgment on a demand of that kind. The defendant would have no right, under the provisions of section 573 of *The Code*, to force the plaintiff to accept the property, when it might have been injured or rendered worthless after conversion, or pay the costs, on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. Woods Mayne on Damages, secs. 520 and 521. But the defendant offers to disclaim title to and surrender the engine and other machinery, alleged to have been converted by him, or pay one and $\frac{80}{100}$

dollars. We can treat the offer, therefore, in this case only as a tender of that amount of money, and, as the jury assessed plaintiff's damages at three hundred dollars, he did recover "a more favorable judgment" than a recovery of one and $\frac{80}{100}$ dollars. The defendant objected to "so much of the judgment as allowed the plaintiff interest from the date of judgment."

The jury had the right, in this case, to determine whether they would allow interest before the rendition of verdict on the amount assessed as plaintiff's damages, and in the exercise of that power gave the plaintiff "three hundred dollars, without interest." *Patapsco Mfg. Co.* v. *Magee*, 86 N. C., 350. After verdict, the statute (*The Code*, sec. 530) provides that the amount of any judgment or decree, except the costs, rendered or adjudged in any kind of action, though not on contract, shall bear interest till paid, and the judgment and decree of the Court shall be rendered according to this section." *McRae* v. *Malloy*, 87 N. C., 196.

This is not an action for the specific property in the nature of detinue or replevin, but for the money as damages, and therefore there is no force in the objection that his Honor should have rendered an alternative judgment for the property, and if delivery could not be had for the value, with damages for the detention. The judgment is affirmed.

No error. Affirmed.

JAMES W. BLACKWELL v. DIBBRELL BROS. & CO.

Pleading and Practice—"Former Judgment"—"Another Action Pending"—Practice in Justice's Courts—"Splitting up" Accounts.

1. The pendency of another action is a defence which must be set up in the answer, or in some way insisted on, before the trial on the merits, or it will be considered as waived.
2. The plea of former judgment must be distinctly set up in the answer as new matter. It will not be considered as embraced under general denials of the allegations of the complaint.
3. Under the present practice a memorandum, "general issue," entered on a Justice's docket as embracing defendant's defence, will be construed to mean nothing more than a general denial of plaintiff's cause or causes of action; hence, evidence of an estoppel by judgment, or of another action pending, is not admissible in support of such a defence.
4. The objection, that a cause of action is not such as can be "split up" so as to bring it within the jurisdiction of a Justice, must be made before the Justice; otherwise it cannot be made in the Superior Court on appeal, unless the defendant is permitted to amend.
5. The refusal by the Judge below to permit an amendment is unreviewable.
6. Remarks of AVERY, J., on the proper practice to be pursued when "another action pending" or "former judgment" are pleaded.

This was a CIVIL ACTION, tried before *Merrimon, J.*, and a jury, on appeal from a Justice's judgment, at June Term, 1888, of the Superior Court of DURHAM County.

The plaintiff sued for the recovery of one hundred and eight dollars and thirty-three cents for rent of a certain brick prize-room for the months of November and December, 1887. The summons was issued on the 13th day of March, 1888, and tried upon a removal by affidavit from one Justice to another, on the 15th day of March, 1888. The defendant pleaded the "general issue and counterclaims amounting to

$89." After evidence by the plaintiff, tending to establish his debt, the defendant offered to introduce the following evidence: That on the 13th day of March, 1888, the plaintiff had sued out another summons against these defendants, in which he claimed the rent due for the same prize-room for the months of January, February, and up to the 13th day of March; that there was judgment for the plaintiff in that action against the defendants, which judgment was satisfied in full; that that action was tried, judgment rendered and judgment satisfied before the present suit was tried. It was proven by the plaintiff, and admitted by the defendants, that the rent was payable monthly, in advance. Upon objection by the plaintiff, his Honor held that the evidence could not be received under any plea pleaded by the defendants, and excluded the evidence. Exception by defendants. Defendants moved to be allowed to amend their answer. His Honor refused to allow the amendment. Defendants excepted. There was verdict and judgment against the defendants.

Messrs. W. W. Fuller and *E. C. Smith*, for the plaintiff.
Mr. John Manning, for the defendants.

AVERY, J. The case is before us upon the single point, whether his Honor erred in excluding the testimony offered on the ground that it was not admissible "in support of any plea pleaded by the defendants."

The transcript contains, on the subject of the pleadings, only the following: "The plaintiff complained for the sum of one hundred and eighty dollars and $\frac{33}{100}$, due by defendants on contract. The defendants pleaded the general issue and counterclaim of $89.07."

The defendants contend that the "general issue" in an action of this kind (assumpsit) was *non assumpsit*, and cites several authorities to show that, under the former practice, a defendant was allowed, under this plea, to show the pen-

dency of another action, or even a judgment in another suit between the same parties, in bar of recovery. We, therefore, deem it pertinent to quote the language of Chief Justice PEARSON in *Branch* v. *Houston*, Busb., 85, in which he so clearly points out the proper time and manner, under the old rules of pleading, of setting up and showing a want of jurisdiction in the Court:

"1. If there be a defect, *e. g.*, a total want of jurisdiction, apparent upon the face of the proceedings, the Court will, of its own motion, stay, quash or dismiss the suit. This is necessary to prevent the Court from being forced into an act of usurpation, and compelled to give a void judgment.

"2. If the allegation bring the case within the jurisdiction, so that the defect is not apparent, and the *general issue* is *pleaded*, the proof not sustaining the allegation, there is a fatal variance, which is ground of nonsuit; *e. g.*, delaration *quare clausum fregit* in the county of Wake—general issue; proof, trespass on land in the county of Johnston; nonsuit, unless affidavit be made according to the statute.

"3. If the subject is within the jurisdiction, and there be *any peculiar circumstance excluding the plaintiffs or exempting the defendants*, it must be brought forward *by a plea* to the *jurisdiction. Otherwise, there is an implied waiver of the objection*, and the Court goes on in the exercise of its ordinary jurisdiction." See also *Clarke* v. *Cameron*, 4 Ired., 161; Wait's Actions and Defences, p. 400.

Under the system of pleading and practice, established by the Code of Civil Procedure, it has been repeatedly held by this Court, that when the defendant relies on a general denial, in the answer, of the allegations of the complaint, such a variance as the example given by the Chief Justice must compel the plaintiff to submit to judgment of nonsuit, unless permitted to amend after mistrial upon such terms as the Court may impose. And while the forms of action are abolished, and the technical rules of pleading dispensed

with, the same principles of law underlie both, and must make the *old and the new practice* and pleading often assimilate. The pendency of another suit between the same parties, and involving the very same subject-matter, being a circumstance *dehors* the record, which exempts the defendant from liability, must, under the formal method peculiar to the common law, have been made available by a plea in abatement before pleading to the merits; and upon the same governing principles is founded the rule, established under *The Code* practice, that the same defence must be "set up in the answer, or in some way insisted on before the trial on the merits, and, if not, will be considered waived." *Hawkins* v. *Hughes*, 87 N. C., 115.

Pomeroy, in his work on Remedies and Remedial Rights, section 711, says: "The defence that another action is pending for the same cause, must be specially pleaded, unless it is raised by demurrer." The same author, in section 721, says: "It is now settled, in direct opposition to the common law rule, that defences, which seek to abate the particular actions in which they are pleaded, may be united with those which seek to bar all recovery upon the same cause of action." The author points out as a difficulty, in the practical working of the rule, that a general verdict for the defendant, upon all of the issues in abatement and in bar, might leave it uncertain whether plaintiff could prosecute another action, or was precluded from doing so. He suggests that in such cases the jury should be instructed, with great care, upon the issues raised by the pleadings as defences of both characters.

The practice of incorporating the defence of the pendency of another action with others, that if established would bar recovery in any action brought for the same cause, has been approved by this Court. The suggestion of the Court in *Hawkins* v. *Hughes*, *supra*, that the matter set up in abatement should be passed upon before a trial upon the merits,

might be made perfectly consistent in practice with the rule laid down by Mr. Pomeroy. A jury could be instructed to respond, first, to an issue involving the question whether another action was pending, and if they should answer that affirmatively, then that they need not extend their inquiries to the other issues, because that finding would make it necessary to dismiss the action that was being tried, and leave the plaintiff to seek his remedy in the other action already at issue between the same parties.

The plaintiff caused summons to be issued by a Justice in both actions on the 13th day of March, 1888. The judgment was rendered in this action on the 15th of March following—but after return and removal to another Justice on the 13th. It does not appear when the other action was tried, but it was tried and judgment entered and satisfied before the Justice *tried this case.*

The pleadings were not written, but in the summons the defendant had notice "to answer the complaint of James W. Blackwell for the non-payment of the sum of one hundred and eight dollars and thirty-three cents, due by contract." Under Rule X, sec. 840, of *The Code*, the Justice would, at the request of the defendant, have required the plaintiff "to exhibit his account or demand, or state the nature thereof," or preclude him from giving evidence as to any demand not exhibited. We must assume, therefore, that the defendant waived his right under the rule, because he either knew the nature of the demand or did not care to know. So, if the defendant did not in fact know he might, by reasonable diligence, have known the cause of action in each of the cases before the trial of either, and so far as we can see, might have pleaded the pendency of the one in the other.

If, however, the record leaves us at liberty to conclude that the other action had been tried, and judgment had been rendered and satisfied before the defendant was required to plead in this action, then the

defendant could not avail himself of the estoppel (even if we concede that this case falls within the rule stated in *Jarrett* v. *Self*, 90 N. C., 478), without pleading specially, in his answer as new matter, the record in the other case. "An estoppel by judgment must be pleaded, if there is or has been any opportunity to do so." Pomeroy on Rem. and Rem. Rights, section 712, note 4. *Caldwell* v. *Auger*, 4 Minn., 217. Where the record and judgment, in a former action, are relied upon to bar recovery in a second suit between the same parties, the plea of estoppel on that ground must be distinctly set up as new matter, in the answer, and will not be considered as comprehended under the general denials of the several allegations constituting the plaintiff's cause of action. *Yates* v. *Yates*, 81 N. C., 397; *Tuttle* v. *Harrill*, 85 N. C., 456; *Isler* v. *Harrison*, 71 N. C., 64; *Falls* v. *Gamble*, 66 N. C., 455; *Gay* v. *Stancell*, 76 N. C., 369.

We cannot construe the "memorandum" "general issue" when made in a Justice's Court, under our present system of pleading, to mean more than that the defendant will interpose a general denial to the cause or causes of action, alleged either *ore tenus* or in a written complaint by the plaintiff, and evidence of an estoppel by a judgment in another action, or of the pendency of another action between the same parties, is not admissible in support of such a defence.

But it is unnecessary for us to decide whether the plaintiff could "split up" his account, and bring two actions instead of one, or whether the account was due under a single contract, and therefore cognizable only in the Superior Court if the evidence had been admitted and was true. It was not competent to sustain the defence, as it was entered in the Justice's Court, and the defendants' counsel admits on argument that the refusal of his Honor to allow an amendment cannot be reviewed in this Court. We concur with his Honor in his ruling.

No error. Affirmed.

J. L. HALL v. LEANDER TILLMAN et al.

Claim and Delivery—Liability of Sureties on Defendant's Undertaking.

1. The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any *debt* which plaintiff may recover in the action.
2. Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by *The Code*, § 326 (as amended by ch. 5, § 2, Laws 1885) and § 431.
3. The effect of the amendment to *The Code*, § 326, by ch. 50, § 2, Laws 1885, is to make the condition of the bond therein provided for harmonious with the judgment authorized by the law regulating proceedings in claim and delivery.

This is an APPEAL by the defendant from a judgment of *Gilmer, J.*, rendered at February Term, 1888, of the Superior Court of CHATHAM County.

The plaintiff alleged that he was the owner of an engine and saw-mill described in the complaint, which were in the possession of the defendants, Tillman and Barber, and wrongfully detained by them.

The said engine and saw-mill were taken under proceedings in *claim and delivery*, and returned to the defendants, who gave the required *undertaking*, with the defendants O. A. Palmer, J. R. Jones and A. P. Gilbert as sureties, as set out in the record.

The action was commenced in November, 1884. At May Term, 1886, there was a trial and verdict of a jury upon issues submitted, and "by consent, the verdict of the jury (was) set aside and new trial ordered."

At Fall Term, 1886, the action was tried and the following issues were submitted to a jury:

1. Is the plaintiff the owner of the saw-mill and engine described in the pleadings?

2. Is the plaintiff entitled to the immediate possession of said saw-mill and engine?

3. What was the value of the said saw-mill and engine at the time of the contract of defendants?

4. What sum was paid on the contract price?

5. What is the value of the saw-mill and engine now?

6. What damage, if any, has the plaintiff sustained by reason of the detention of said saw-mill and engine?

The jury responded to the first and second issues, "Yes." There was no response to the other issues, and the following judgment was rendered:

"This cause coming on to be heard before me and a jury, upon the pleadings, proofs and arguments, and the jury having found the first and second issues in favor of the plaintiff: Now, on motion of John Manning and T. B. Womack, attorneys for the plaintiff, it is ordered and adjudged that the plaintiff recover of the defendants the sum of six hundred and sixty-six dollars and sixty-three cents, with interest on five hundred and eighty-seven dollars and eight cents from the first day of the term until paid, together with the costs of this action, to be taxed by the Clerk. It is further adjudged, that if the said sum of six hundred and sixty-six dollars and sixty-three cents, and interest, be not paid on or before the first day of December next, then, and in that event, A. P. Gilbert and T. B. Womack are appointed commissioners to sell the saw-mill and engine described in the pleadings at public auction for cash, first advertising the same according to law, and apply the proceeds to the extinguishment of this judgment, interest and costs, and pay the surplus, if any, to the defendants.

"That this cause be held for further direction, and trial of the remaining issues."

After the record of the verdict, the following entry appears:

"Judgment. Appeal. Bond fixed at $40." But no appeal was perfected.

At February Term, 1887, the commissioners made the following report:

"A. P. Gilbert and T. B. Womack, commissioners under judgment of Fall Term, 1886, in this cause, respectfully report that, after due advertisement, they, on the 12th day of February, 1887, sold at public auction, for cash, the saw-mill and engine described in the pleadings, when and where Joseph Malone became the last and highest bidder in the sum of two hundred and fifty dollars, and has complied with the terms of the sale; that they have applied said sum of two hundred and fifty dollars as a credit on said judgment."

Upon which the following judgment was rendered at the same term:

"This cause coming on to be heard upon the report of A. P. Gilbert and T. B. Womack, commissioners, herein filed, no one objecting: Now, on motion of John Manning and T. B. Womack, attorneys for plaintiff, it is adjudged that the said report is ratified and confirmed, and this cause is continued for the plaintiff."

The case on appeal states that at February Term, 1888, the plaintiff, through his counsel, announced that the only action he proposed to take in the case was to move for judgment against the sureties upon the undertaking of the defendants for the residue of the plaintiff's debt, after the application to said debt of the proceeds arising from the sale of the property in controversy.

This motion was accordingly made, and resisted by the defendants upon the ground that the judgment theretofore rendered at Fall Term, 1886, of the Superior Court of said county of Chatham, in the above entitled cause, was irregular, void, and not supported or justified by the record and papers in the case, and that the said sureties were not liable for the amount of said judgment, or any part thereof.

The motion of the plaintiff was granted, and judgment rendered accordingly. The defendants excepted.

The defendants then moved to set aside the said judgment theretofore rendered at Fall Term, 1886, as aforesaid, upon the ground that the said judgment was irregular and contrary to the course and practice of the Court. From which said judgment and rulings the defendants appealed to the Supreme Court.

The following is the judgment:

"This cause coming on to be heard before me upon the motion of the plaintiff for summary judgment upon the replevy bond of the defendants herein filed, after argument by counsel representing both plaintiff and defendants, it is ordered and adjudged that the plaintiff do recover of O. A. Palmer, J. R. Jones and A. P. Gilbert, sureties upon the defendants' undertaking, the sum of sixteen hundred dollars, to be discharged upon the payment of the sum of four hundred and forty-eight dollars and fifty-nine cents ($448.59), with interest from the first day of this term, and the costs of action, to be taxed by the Clerk."

Messrs. T. B. Womack and *John Manning*, for the plaintiff.
Mr. A. R. Gilbert, for the defendants.

DAVIS, J. (after stating the case). Section 326 of *The Code*, as amended by ch. 50, sec. 2, of the Acts of 1885, provides for the return of property taken under proceedings in claim and delivery, upon giving an undertaking by the defendant, payable to the plaintiff, executed by one or more sufficient sureties, &c., for the delivery thereof to the plaintiff, with damages for its deterioration and its detention, if delivery can be had, and if such delivery cannot for any cause be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property, at the time of the wrongful taking, or detention,

with interest thereon, as damages for such taking and detention.

Section 431 of *The Code* provides: "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and the damages for the detention."

This action is brought to recover the possession of an engine and saw-mill. The defendants admit that they are in possession of the engine and saw-mill, and deny the other allegations of the plaintiff. Nowhere in the record does it appear that the plaintiff had, or is seeking to recover any debt against the defendants, and if there was such a claim it would not be covered by the undertaking of the sureties of the defendants.

The only issues passed upon are the first and second, and the only facts found by the jury are that the plaintiff is the owner of the saw-mill and engine, and that he is entitled to the immediate possession. No other issues were passed upon. It nowhere appears by the finding of the jury, or in any other way, that the plaintiff has sustained any damage by the deterioration or detention of the property. Upon a careful inspection of the record, we can nowhere find any allegation, admission, or finding of any fact upon which the judgment rendered at Fall Term, 1886, could have been for anything but restitution, and if there were that judgment is not such as is contemplated by the statute to bind the sureties upon the defendants' undertaking.

Unquestionably, a plaintiff is entitled to summary judgment against the sureties in an "undertaking of defendant to retain property," where the judgment is "for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and the damages" for its detention. *Insurance Co.* v. *Davis*, 74 N. C., 78; *Harker* v. *Arendell*, *ibid*, 85, and cases cited. But the judgment must

be such as is authorized by law. *The Code*, § 431; *Council* v. *Averett*, 90 N. C., 168; *Horton* v. *Horne*, 99 N. C., 219; *Manix* v. *Howard*, 82 N. C., 125.

We are not inadvertent to the fact that this action was commenced prior to the amendment by chapter 50, Acts of 1885, but that in no way affects the character of the judgment, and the effect of the amendment is to make the condition of the bond harmonious with the judgment authorized.

Our attention is called to the fact that the judgment, in *Council* v. *Averett*, *supra*, was not in the alternative, as required in claim and delivery, but was similar to this. A glance at the case will show the difference. There, by agreement, the alternative judgment was dispensed with, and by *consent*, a judgment was entered for the value of the goods taken, and the Court, after stating and recognizing the proper mode of entering judgment, puts the decision upon the ground of agreement and consent.

But the learned counsel for the plaintiff says that no objection was made to the judgment rendered at Fall Term, 1886. In that judgment the cause was "held for further direction and trial of the remaining issues."

No one of the remaining issues has been tried, and the trial and finding upon at least one of them is necessary, to determine the liabilities of the sureties on the defendants' undertaking.

Error. *Venire de novo.*

W. H. RYAN, Trustee, et al. v. W. A. MARTIN et al.*

Tax Sale of Mortgaged Property—Mortgagor and Mortgagee—Practice, motion in the cause—The Code, §§ 120–237.

1. A mortgagor's purchase of the mortgaged land at a sale for taxes due by himself, is absurd and void, and will not affect the mortgagee's rights.
2. A mortgage, given under § 120 of *The Code*, *in lieu* of the bond required by § 237, may be foreclosed by motion, upon notice, in the original action.

APPEAL from an order of *Shepherd, J.*, rendered at August Term, 1887, of GUILFORD Superior Court.

The plaintiff brought this action to recover possession of land specified in the complaint. The defendant W. A. Martin was allowed to become party defendant as landlord, and instead of giving an undertaking with surety thereto, as required by the statute (*The Code*, § 237), he and the appellant (who was his wife), on the 11th of March, 1879, executed a mortgage of certain lands therein described to the plaintiff, as allowed by the statute (*The Code*, § 120), which was accepted and filed in the action. The condition thereof was to the effect that if the mortgagor should fail to pay the mortgagees "all such costs and damages" as they might recover in this action, then they might sell the land, &c.

Afterwards the plaintiffs obtained judgment for the possession of the land, as demanded by the complaint, and for the rents, profits and costs. Thereupon an execution against property was issued, which the Sheriff returned *nulla bona*.

Thereafter the plaintiffs gave the mortgagee notice of a motion in the action "for order of foreclosure of the mortgage deposited"—that mentioned above.

The appellant resisted the motion upon the grounds that the land, the subject of the mortgage, was her own separate property; that there were arrearages of taxes due for the same for the years 1872, 1873, 1874 and 1875, amounting to $175; that

*SHEPHERD, J., did not sit.

the Sheriff sold nine acres to pay the taxes, the 17th of December, 1877; that she thereafter paid such taxes, and after the lapse of twelve months, took the Sheriff's deed for the land on the 2d day of December, 1879; that on the 1st of December, 1879, the Sheriff sold one hundred and one acres of land to pay other arrearages of taxes due for the same for the years 1876, 1877, 1878; that she paid such taxes and took the Sheriff's other deed for the land, dated the 5th of March, 1881; that such tax deeds were registered; that she has had possession of the land ever since; that the plaintiffs recovered the rents for the whole of the land, including what she so purchased, and she demanded an account, and that she should not be charged with the rents thereof, &c.

It appeared that the appellant made the purchases of the land, as claimed by her, pending this action, and afterwards applied to the Court to be made a defendant, to enable her to set up her claim, which application was denied, and she did not appeal; that she brought a separate action to enjoin the execution of the judgment obtained by the plaintiffs for the possession of the lands, rents, &c., which action was decided adversely to her, and she did not appeal from the adverse judgment therein. The Court gave judgment, whereof the following is a copy:

"It is now, on motion, adjudged by the Court that the plaintiffs have the right to judgment of foreclosure of the mortgage aforesaid, and that unless W. A. Martin and Jane C. Martin shall pay, or cause to be paid, the sum secured by said mortgage, to-wit, the sum of $200, into the office of the Clerk of this Court, as a credit on the plaintiffs' damages ($245), and the costs ($22) hereinbefore mentioned, within thirty days from this term of the Court, then, and in that case, it is adjudged that the Clerk of this Court be and he is hereby appointed a commissioner, whose duty it shall be, after thirty days' advertisement in some newspaper published

in Rowan County of the time and place of sale, to proceed to sell at auction to the highest bidder, the lands conveyed in the mortgage aforesaid, at the court-house in Salisbury, for ready money, and report his sale to the next term of this Court for confirmation and order of title; and the cause is retained for further orders and directions."

From this judgment Jane C. Martin, having excepted, appealed to this Court.

Mr. E. C Smith, for the plaintiff.
Mr. L. M. Scott, for the defendant.

MERRIMON, J. (after stating the case). It was not contended that the mortgage mentioned was in any respect objectionable. It purported to be that of the appellant and her husband. They covenanted specially therein with the plaintiffs that they were seized of the land conveyed—that they had the right to convey the same—that it was free from incumbrance—and for the quiet enjoyment thereof. It seems that the land really belonged to the appellant, and at the time of the sale of part of it to pay the taxes it was hers, subject to the mortgage.

The arrearages of taxes were due, and ought to have been paid, before the mortgage was executed. The appellant was bound to pay them, whether they, or any part of them, constituted a valid incumbrance on the land or not. She allowed a part of it to be sold to pay them, and bought it herself—bought her own land. She undertook to take the Sheriff's deed for it, and now insists that she has a title to it other than that that she incumbered by the mortgage.

Her supposed purchase at the Sheriff's sale was absurd and void; it went for nought, and did not affect the rights of the mortgagees; she could not purchase the land from herself. Besides, it seems that she was estopped by the judgment adverse to her in the action she brought to obtain relief by injunction.

There is no error, and the judgment must be affirmed. To the end that further proceedings may be had in the action, let this opinion be certified to the Superior Court.

No error. Affirmed.

HARRIET J. ASKEW v. W. F. ASKEW and wife et al.

Dower—How Allotted in Mortgaged Lands, &c.

1. In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment, under § 2103 of *The Code*, should not be in part of the lands as if unincumbered or subject to same incumbrance, but in each parcel separately, and then the widow can work out her relief by asserting her equity against each creditor, as he seeks to enforce his security

2. Nor, in such case, should the widow be allowed the use for life in a specific sum of money in lieu of dower in a parcel of the mortgaged lands, not deemed susceptible of allotment by metes and bounds, but the allotment should be of one-third, for life, of the premises in value—her share being fixed by law, and not depending on estimates.

SPECIAL PROCEEDINGS for dower, heard before *Graves, J.*, upon appeal from the Clerk, at April Term, 1889, of the Superior Court of WAKE.

William F. Askew, residing in Wake County, died in the month of November, 1887, leaving a widow, Harriet J. Askew, and numerous children, and seized and possessed of a large estate, real and personal, all of which, in his will, he devises and bequeaths to the said Harriet J., in absolute property. Upon the probate of the will, on the 4th day of January, next after his death, she entered her dissent thereto, and thereupon filed a petition for an allotment of dower in

the lands owned by the deceased testator, describing them without mention of incumbrances thereon, against the children, and the wives and husbands of such as were married; and such proceedings were had therein that her dower was duly assigned by commissioners, who, instead of separating the paper-mill lands, gave to her a fractional interest in the money value thereof as an entirety.

Certain creditors were thereupon allowed to intervene and contest the method pursued in making the assignment, and the facts alleged in their petition are agreed upon, and are as follows:

"1. That at the February Term, 1887, of the Superior Court of Wake County, to-wit: on the 10th day of March, 1887, in an action entitled The State of North Carolina, on the relation of Annie E Carr, administratrix of Minnie Moore, deceased, and Albert G. Carr, against Wm. F. Askew, R. G. Dunn, J. B. Dunn, Virginia B. Swepson, executrix of George W. Swepson, deceased; John A. Cheatham, David Lewis, Wm. A. Smith, William K. Davis and John Gatling; the plaintiffs therein recovered judgment against the defendants therein (the defendant Wm. F. Askew being principal and the other defendants being sureties) for the sum of $20,000, to be discharged upon the payment of $10,000, with interest thereon from the 8th day of March, 1887, until paid, at the rate of eight per cent. per annum, and the costs to be taxed by the Clerk, which said judgment was duly docketed in the Superior Court of Wake County in Judgment Docket No. ____, page ____, and is prayed to be taken as part of this petition.

"2. That no part of said judgment has been paid, but the same now remains due and unpaid.

"3. That on the 11th day of November, 1887, the said William F. Askew died in the said county of Wake, leaving a last will by which he devised and bequeathed all his property, both real and personal, to his wife, Mrs. Harriet J.

Askew, which said will was probated on the 4th day of January, 1888, and duly recorded in the Clerk's office; and on the said 4th day of January, 1888, the said Mrs. Harriet J. Askew dissented from said will, and filed such dissent in the office of the Clerk of the Superior Court of Wake County.

"4. That on the ____ day of ______, 188__, W. A. Smith, one of the defendants in said above-mentioned judgment, died intestate, and _____, one of these petitioners, was duly appointed administrator of his estate, and qualified according to law.

"5. That on the ____ day of _____, 188__, David Lewis, one of the defendants in said above-mentioned judgment, died intestate, and W. C. Stronach and Thomas Johns, two of these petitioners, were duly appointed administrators of his estate, and qualified according to law.

"6. That on the 31st day of March, 1888, Mrs. Harriet J. Askew, widow of Wm. F. Askew, deceased, having dissented from said will, instituted proceedings in the Superior Court of Wake County, entitled as hereinbefore first above, asking that dower be allotted to her, by metes and bounds, in the lands of her husband, describing the same, as will more particularly appear upon reference to her petition filed.

"7. That in her petition for dower, the said Mrs. Harriet J. Askew alleged that her said husband, W. F. Askew, at the time of his death, was seized and possessed in fee-simple of certain tracts of land, describing each, and embracing in such enumeration all of the lands of her husband, whether he held the legal estate therein or only an equity of redemption.

"8. That said petition did not state, nor did it appear anywhere in said proceedings, that many of the said tracts of land had been conveyed by way of mortgage by W. F. Askew and Harriet J. Askew, his wife (the latter being privily examined according to law), in his life-time, to secure large sums of money, which were still due and owing at the time

said petition was filed and dower assigned, as will hereinafter more particularly appear.

"9. That such proceedings were had from time to time on said petition for dower as resulted in having allotted to her, the said Mrs. Harriet J. Askew, as her dower, one-third in value of the entire real estate of her husband; and in estimating such value no deduction was made for the amount of the mortgages then existing, but such value was ascertained as if all of said lands were entirely free from any and all incumbrances, and judgment was accordingly signed for such dower on the 24th day of November, 1888, by Charles D. Upchurch, Clerk of the Superior Court of Wake County.

"10. That on the 1st day of May, A. D. 1882, the Neuse Manufacturing Company sold and conveyed to Wm. F. Askew and his heirs certain land and personal property, the said lands being as follows: One tract at the Great Falls of Neuse River, and on both sides thereof and including the Falls, containing 113 acres; one tract lying on the north side of Neuse River, containing about 37 acres, being the tract bought of Ellis Garrett by A. M. High, and by mesne conveyances to Neuse Manufacturing Company; one tract adjoining the aforesaid Falls tract, containing about 51 acres; one tract, of which Thomas Garrett died seized, lying on the north side of Neuse River, adjoining the aforesaid Fall tract, and containing 206 acres; one tract adjoining the lands of Nathan Bolton, R. L. Allen and J. M. Crenshaw, containing $50\frac{1}{8}$ acres; one tract, containing about $1\frac{1}{2}$ acres, adjoining the lands of R. L. Allen, the Falls of Neuse Manufacturing Company and D. F. Fort; one tract adjoining the lands of R. L. Allen, the Falls of Neuse Manufacturing Company and D. F. Fort, known as the Gin Lot, all of said lands being in Wake County. And the said W. F. Askew paid a part of the purchase money therefor, and on the said 1st day of May executed his note for the balance of the purchase money as follows: For the sum of $12,000, with interest at the rate

of eight per cent. per annum from the 1st day of July, 1882, payable semi-annually, evidenced by his twelve notes, under seal, each for the sum of $1,000, payable ten years after date, and to secure the payment of said purchase-money notes, he, the said Wm. F. Askew, and Harriet J. Askew his wife, made out, executed and delivered to the said the Falls of Neuse Manufacturing Company a deed of mortgage, contemporaneous with said deed of sale, conveying all of said lands which he, the said Askew, had purchased of the Falls of Neuse Manufacturing Company, which said deed of mortgage was duly acknowledged and recorded in the office of Register of Deeds of Wake County, in Book 70, page 558, and prayed to be taken as part of this petition. That no part of said balance of purchase money has been paid, and the interest is now due thereon from the 1st day of July, 1887, and was so due and unpaid at the time said dower was allotted as hereinbefore stated. That the notes for the purchase money as aforesaid were transferred and indorsed for value by the Falls of Neuse Manufacturing Company to Mrs. Harriet J. Askew and her daughter, Miss Maggie Moore Askew, and they are now their property, subject to a claim of the National Bank of Raleigh, N. C.

"11. That all of the lands mentioned in the preceding paragraph were embraced in the petition for dower, and in which the dower, for the most part, was allotted.

"12. That on the 6th day of November, 1879, Wm. F. Askew, being indebted to Miss Mildred Cameron in the sum of $4,000, evidenced by his bond, payable on the 6th day of November, 1882, bearing interest from date at eight per cent. per annum, payable semi-annually, evidenced by six coupon bonds to secure the payment of such indebtedness, he and his wife, Mrs. Harriet J. Askew, conveyed by way of mortgage to John W. Graham, trustee, the lot of land mentioned and described in the petition for dower as lying in the city of

Raleigh, being lot No. 36 and part of lot 20, as shown by Shaffer's map of said city. That said deed of mortgage was duly acknowledged by both W. F. Askew and Harriet J. Askew his wife, and duly recorded in the Register's office of Wake County, in Book 56, page 198, and prayed to be taken as part of this petition.

"That no part of said indebtedness has been paid, and the interest is now due thereon from the 6th day of May, 1887, and was so due and unpaid at the time said dower was allotted as hereinbefore stated.

"That the land mentioned in this paragraph was embraced in the petition for dower.

"13. That these petitioners had no notice of the proceedings to have dower assigned and were not parties thereto.

"14. That they are informed by counsel learned in the law that the dower assigned to Mrs. Harriet J. Askew, as hereinbefore mentioned, was allotted contrary to law, in that the commissioners should have, in estimating the value of the real estate upon which the mortgages above stated rested, deducted the amount thereof, and only given dower in its equity of redemption.

"15. That by reason of the allotment of dower as aforesaid, these petitioners believe, and so aver, that the balance of the real estate of W. F. Askew, not covered by the dower and the mortgages aforesaid, will prove insufficient to pay off and discharge the judgment particularly set forth in the first paragraph of this petition, and said balance will fall upon the estates represented by them.

"16. That Spier Whitaker, Esq., who is the administrator with the will annexed of Wm. F. Askew, deceased, has filed a petition in the Superior Court of Wake County asking for a sale of the real estate of his intestate, with which to pay debts; and among other allegations contained in his petition is that the personal estate of the said Wm. F. Askew, deceased,

according to the best of his opinion and judgment, is worth about $500."

Whereupon, these petitioners ask—

1. That the judgment made on November 24, 1888, in the proceedings for dower, as in this cause entitled, confirming the report of the jury allotting dower to Mrs. Harriet J. Askew, be set aside.

2. That these petitioners be allowed to come into said suit as parties defendant, file answers to said petition for dower, and except to the report of the jury as filed therein.

3. And for such other and further relief as the nature of the case and the cause of justice demands.

Whereupon, after argument, his Honor gave the judgment set out in the record, from which petitioners appeal.

Messrs. Geo. W. Snow and *A. W. Haywood*, for the creditors.
Mr. J. N. Holding, for the widow.

SMITH, C. J. (after stating the facts). The complaint made by appellants to the manner in which dower is assigned, in respect to the lands under mortgage, lies in the fact that one-third in each, as a whole, and as if free from any incumbering debts, was allowed, instead of one-third in value of the equity of redemption—that is, of the full estate, reduced by the amount of the incumbrance. Upon the ground of this alleged error, and for its correction, redress is sought in the appeal to this Court.

The commissioners have placed a money estimate upon the several parcels of land left by the deceased, without distinguishing between such tracts as are, and such tracts as are not, charged in deeds of trust with the payment of debts, and have assigned to the widow the whole three-acre lot at Chapel Hill, estimated to be worth $2,500, for her life, have assigned to her no part of the lot in Raleigh, valued at $5,500, and subject to an incumbrance of a secured debt

due to Mildred Cameron of $4,000, by note payable November 6, 1882, and bearing interest at the rate of eight per cent. per annum, how much remains still due being principal and interest to May, 1887. The remaining tracts, which are many in number, and are grouped together as a body, not admitting of separation into parts without impairment in value, are put at a valuation of $27,500, and, to assure the remaining dower, an interest therein of $73 $33\frac{33}{100}$ is assigned as a charge thereon. It thus appears that the aggregate value of the dower is made up of an estimate of the different tracts, as if all were free from incumbering liens, and apportioned in the manner stated. This seems to have been done under the statute which declares that the jury or commissioners "shall not be restricted to assign the same (dower) in every separate and distinct tract of land; but may allot her dower in one or more tracts, having a due regard for the interest of the heirs, as well as to the right of the widow." *The Code*, § 2103.

This rule is well settled in this State, whatever may be the decisions elsewhere. Under our statute an interpretation is put upon it that a widow is entitled to dower in lands held by her deceased husband under a bond for title, whether the purchase money has been paid or a part of it remains due, and also in any equity of redemption in lands which have been conveyed to secure a debt or liability. The widow's right in such cases, as against the heir or devisee, to have her dower assigned in the entire tract, and the remaining two-thirds, as well as the reversionary interest in the part covered by her dower, sold in exoneration, when the personal estate is not sufficient, and her dower only sold when needed, after these appropriations, to pay the secured debt or discharge the liability, is equally well settled.

In *Thompson* v. *Thompson*, 1 Jones, 430, it was decided that a right to dower existed in lands held under a contract to convey when paid for, though part of the purchase money

was due, but without regard to its diminished value in consequence thereof, and that the personal estate applicable to the debt must be employed in relieving the land of the burdening liability. In the opinion a doubt is expressed as to whether the residue of the estate in the land should, in case of failure of personal property, be also thus applied in relief of the dower. The doubt was resolved in favor of the widow in *Caroon* v. *Cooper*, 63 N. C., 386, and the result stated in these words: "Our conclusion is that the widow is entitled to have dower assigned out of the whole tract, and cannot be called on until it is ascertained that the remaining two-thirds and the reversion in the one-third, covered by her dower, are insufficient to pay off the incumbrance of the purchase money."

In *Creecy* v. *Pearce*, 69 N. C., 67, the doctrine is extended and made to embrace an equity of redemption in lands conveyed in trust; and while the residue of the estate, outside of the dower, must be put in the forefront of liability in discharging the incumbrance, its full amount has no priority over other debts of the same class, out of the personal assets; its residue, after the reduction by the said funds, must share with other debts in the distribution of assets in the hands of the administrator. In like manner, it is held that the bankrupt must take, when there are none but incumbered lands, his exempt real estate out of the lands estimated, as if unincumbered. *Burton* v. *Spiers*, 87 N. C., 87.

If necessary, however, to meet the debt or liability resting upon the land, the dower must also go, for it is allotted in subordination to the claim of the creditor, to a full satisfaction of his debt. It is obvious the doctrine prevailed only in reference to a single tract of land, or several conveyed by the same deed, or included in the same contract, and determines the relation and rights of parties thereunder. The decisions proceed no further.

In order to the enforcement of the widow's equity, the dower must first be laid off in the manner directed by law; and when the creditor seeks by a specific performance to subject the lands to his debt, the equity of the widow springs up, to have all outside of her dower estate in the premises sold, and the proceeds thereof first applied in discharge of the debt, so that, if found to be sufficient, she may have her dower exonerated or reduced to a sum she may be able to meet, and thus have full and absolute relief. It is plain that the value of the dower is the allotted part, diminished by the sum necessary to be raised for its relief, after exhausting these resources first applicable, and this value would depend upon the further sum to be raised out of the dower land itself. It would be manifestly unjust to take the full value of incumbered lands, as if they were free from incumbrance, and assess other lands, held under a different title, with the entire sum, in awarding dower therein; nor do the adjudications referred to warrant any such course.

It might be, as, perhaps, it was, so considered by the commissioners, that the lots in Raleigh were burdened to their full value, and no practical benefit would be secured by assigning dower therein; and surely one-third of that portion of the testator's estate ought not to be allowed to swell the aggregate value of the dower, and be imposed on other lands. It is equally plain that the whole lot at Chapel Hill should not be assigned in the absence of any evidence that her dower in all the lands would be of equal value with that lot. The statute which authorizes the assignment of the dower in parts of the lands, instead of upon each separate tract, has reference to the rights and interests of others as well as that of the widow, and the exercise of the power must be in the sound discretion of the commissioners, and where no wrong is thereby done to others.

But it cannot be exercised upon the basis of the rulings appropriate to lands held under one title and subject to the

same incumbrance. In the present case, the application is a simple one for the allotment of dower, and its purpose is attained by an assignment in each separate parcel. It is impossible to tell the value of the dower in the incumbered estate, until there has been a sale of the outside parts and the reversion, nor is this possible before an assignment and location of the dower have been in fact made and the price they will bring ascertained. If the whole tract was sold, as, by consent, it may be, the fund could be apportioned between the creditor and widow; but this would not be an assignment of dower, or a specific appropriation of lands as such, but a division of the money, and she not only does not assent to this, but demands to have her dower defined and set apart in all the lands.

It is plain that the doctrine established in the adjudications, and which is limited to lands under one and the same trust, cannot, with any justice, be carried so far as to embrace lands under a different trust, and subject to liens of different proportionate sums, with the necessary uncertainty as to how far the dower in each may be exonerated by the application of the widow's equity in reference to each, separately considered.

To secure the benefits of the principle, so far as the incumbered lands are involved, the widow must do as she has done here, ask an assignment of her dower in all the lands, and then she works out her relief by asserting her equity against the creditor when he seeks to specifically enforce his contract, or foreclose by a sale.

We think there is error in the manner in which the commissioners dispose of the petitioner's claim upon the series of tracts which are consolidated and treated as one body. Besides the rectification of the error, in not allowing the petitioner an interest—that is, a life use—in one-third of the estimated value of the whole, but a smaller sum, if undivided and to be held in common, the allotment should have

been of one-third of the premises in value, as the law awards, and not the use of any specific sum, for that sum may not be realized by the sale; and whether more or less, her share therein is fixed by the law, and does not depend upon estimates thus made. There would be no difficulty in putting the dower derived from several tracts, put wholly upon one or more, when all are unincumbered, for this is both allowed by the statute and is consistent with the rights of other interested parties.

For the reason stated, the judgment must be set aside as erroneous, and a new allotment of dower ordered to be made. To which end, this will be certified to the Court below.

Error.

ANNA FLAUM and her husband v. WALLACE BROTHERS.

Married Woman—Contracts of.

1. A married woman deposited a certain sum of money, being part of her separate property, with W.; afterwards she agreed with W. to leave said sum in his hands as security or collateral for an indebtedness from F. to W., W. to retain the money until such indebtedness from F. to W. should be reduced to a certain amount. This agreement was in writing, signed and sealed by W. and the married woman and her husband. As part of this transaction W. gave the married woman a note for the sum deposited by her with him, the note expressing on its face that it was "not transferable," and being payable one day after date. The married woman and her husband sued W. on the note before the terms of the above-mentioned agreement had been complied with: *Held*, that they could not recover.

2. The principles declared in *Pippen* v. *Wasson*, and approved in *Dougherty* v. *Sprinkle*, establish the proposition, that whenever, under the laws in force prior to the Constitution of 1868, a *feme*

covert, in the absence of any special provisions in the deed of settlement, could, with the consent of her trustee, bind her equitable separate estate, she may *now*, with the written consent of her husband, bind her statutory separate estate. Where the case falls within the exceptions mentioned in *The Code*, § 1826, the consent of the husband is not required.

3. Under the present Constitution and laws of this State a married woman may, with the written consent of her husband, *expressly* charge her statutory separate *personal* estate by her engagements in the nature of executory contracts, although the consideration for such engagements does not inure to her benefit, or to that of her separate estate. The intent to so charge must in such cases appear in the instrument creating the liability, but it is not necessary that *specific* property be charged.

4. A married woman may, with the concurrence of the trustee, where such concurrence is required, charge her equitable separate estate to the extent of the power of disposition conferred by the deed of settlement. Of course, where there are limitations, or other special provisions, these must be strictly pursued.

5. Whether a married woman's engagements can, under any circumstances, bind her separate *real* estate in the absence of a *specific* charge by way of mortgage or other conveyance, is an open question still, as it does not arise in this case, and was not passed upon in *Arrington* v. *Bell*, 94 N. C., 248.

6. No peculiar efficacy is given to a married woman's writings under seal, where they are in the nature of executory contracts, as the Courts will in all cases look into the consideration, and if it be such as would sustain an action upon a contract made by a person *sui juris* it will be sufficient.

7. The complaint, in an action to enforce an executory contract of a married woman, should allege that she has a separate estate subject to the charge sought to be enforced; and the execution can issue against that alone.

8. A married woman can claim the same exemption from execution as she would be entitled to if she were a *feme sole*.

CIVIL ACTION, tried before *Brown*, *J.*, at February Term, 1889, of IREDELL Superior Court.

The plaintiffs were Anna Flaum and her husband, the defendants the members composing the mercantile firm of Wallace Brothers.

The complaint alleged, in substance, that for value received of the plaintiff, Anna Flaum, the defendants, in their firm name of "Wallace Bros.," made and delivered to said Anna Flaum, on March 5, 1886, the promissory note, a copy of which is hereafter given; that no part of said note had been paid, but the whole was still due.

The answer admitted the execution of the note, and alleged that it contained only a part of the contract between Anna Flaum and defendants; that the note was given for money which Anna Flaum had left on deposit with defendants, and at the time of its execution the defendants, at plaintiffs' request, turned over to the firm of Flaum Brothers (a mercantile firm composed of plaintiffs' sons) goods of the value of $996 25, which Anna Flaum had previously purchased of defendants at the price of $996.25, and for which she owed the entire price; that Flaum Brothers took said goods and assumed the indebtedness for the price thereof, and to pay eight per cent. interest on such indebtedness; that defendants agreed to allow Flaum Brothers to have said goods only upon the express understanding that Anna Flaum would not only secure the payment for the same, but that she would likewise secure an amount of over $1,500, which said Flaum Brothers owed defendants for other goods previously sold them, making a total indebtedness due from Flaum Brothers to defendants of $2,497.57, on March 4, 1886; that in consideration of such understanding and as security for such indebtedness of Flaum Brothers, the plaintiffs entered into the written agreement with defendants, a copy of which appears hereafter; that said agreement, bearing date March 3, 1886, was executed as part of the same transaction under which the note sued on was given—that they were intended to be, and defendants insisted should be, construed together as one contract; that Flaum Brothers had not paid the $996.25 and interest, nor had they reduced their entire indebtedness to $750, but still owed defendants about $1,500.

Upon which statement of facts defendants insisted that the conditions, upon which plaintiffs would be entitled to demand payment of the note or maintain their action, had not been fulfilled.

The note sued on was as follows:

"$540.88. STATESVILLE, N. C., March 5, 1886.

"One day after date we promise to pay to the order of A. Flaum five hundred and forty dollars and eighty-eight cents, without defalcation, for value received, with 8 per cent. interest per annum. Not transferable.

"WALLACE BROS."

It was admitted that A. Flaum was, at the date of said instrument, and is still, the wife of Julius Flaum, and that said money has not been paid. The plaintiffs having offered said paper in evidence, the execution of the same being not denied, rested their case. It is admitted that there is no evidence in this case that A. Flaum is a free trader.

The defendants then, in support of their contention that the paper sued on represented and evidenced but a part of the entire business transaction between themselves and plaintiff A. Flaum, out of which said instrument originated, introduced Wm. Wallace, one of the defendants, as a witness, who testified that the written agreement, of which a copy appears below, was signed and executed by plaintiff A. Flaum, with her husband Julius Flaum, in the presence of the witness, and of each other, on the 4th day of March, 1886, at the said A. Flaum's place of business, and was delivered to defendants that day; that it had been prepared and sent to her residence on the evening of March 3, 1886, for her inspection, and thus bore date accordingly; that she came down to her place of business in town the next morning (March 4), bringing said agreement with her, and upon witness going over to her said place, the said agreement was

signed and executed by plaintiff A. Flaum and husband, as aforesaid.

Objection was made in apt time to the admission of this testimony by the plaintiffs' counsel; objection overruled, and plaintiffs' counsel excepted.

Said witness further testified, that when said agreement, hereinafter copied, was so signed and executed by A. Flaum and her husband, she had the sum of $540.88 on deposit with defendants, and that this was the identical money for which the defendants gave her the instrument sued on, and referred to in the written agreement offered by defendants, and that the reason said instrument bears date March 5, was that when they had executed the agreement hereinafter copied (on March 4, as aforesaid) it was found that said A. Flaum had forgot to bring down town, from her residence, some other written evidence of her said deposit with defendants (which his Honor did not, however, permit to be described as to form or contents), and which was to be surrendered and substituted by the instrument sued upon, and so the making of this latter was postponed until that could be done, and in this way came to be made and dated March 5, 1886, while the said agreement was dated March 3, and executed March 4.

Plaintiffs' counsel objected in apt time to the admission of the above testimony, and the objection being overruled, they excepted.

Defendants then introduced the aforementioned written agreement, executed by said A. Flaum and her husband, and which is as follows, to-wit:

"We, Wallace Bros., have this the 3d day of March, sold to Flaum Brothers, of Hickory, the goods bought of A. Flaum February 22, 1886, for the amount of A. Flaum's indebtedness to us ($996.25) on twelve months time at 8 per cent. interest from date. Flaum Brothers are to give us a deed of trust on entire stock, which is to be recorded. The said

A. Flaum agrees to indorse the note if required. If, in or at the expiration of the twelve months, the above amount shall have been settled in full, then we are to allow A. Flaum to draw the money she has now on deposit with us, if she desires to invest in real estate, which real estate, if bought, the said A. Flaum agrees to convey to us in some way as a security against whatever Flaum Brothers may owe us; otherwise than for real estate purchases, the said amount to remain in our hands as security or collateral, unless Flaum Brothers shall have reduced their account with us to (say) $750, then the said A. Flaum may withdraw amount at pleasure.

"In testimony whereof, we, the above named, together with Julius Flaum, husband of A. Flaum, witness our hands and seals.

"(Signed) A. FLAUM [Seal].
JULIUS FLAUM [Seal].
WALLACE BROS. [Seal]."

Plaintiffs' counsel objected to the admission of this paper. Objection overruled, and they excepted.

It was admitted that Flaum Bros. were the sons of plaintiff A. Flaum.

The witness, Wm. Wallace, testified further, that the foregoing agreement, signed by A. Flaum and her husband, was delivered to and kept by defendants, and that defendants gave the instrument sued on to A. Flaum as evidence of her aforesaid $540.88 on deposit, and referred to in said written agreement with defendants [that it was made "not transferable" to prevent it from going into possession of persons strangers to the foregoing agreement]. He further testified that Flaum Bros. owed defendants at the date of said papers over $2,400, including the $996.25 then advanced and mentioned in the aforesaid agreement; that they now owed defendants $1,370.50, and that they have never (since March

4, 1886) reduced their indebtedness to defendants as low as $750, nor anywhere near that sum.

Plaintiffs' counsel, in apt time, objected to the admission of said testimony; the objection being overruled, except as to the sentence enclosed in brackets, plaintiffs' counsel excepted.

The evidence enclosed in brackets was ruled out, on motion by plaintiffs.

Witness also testified that A. Flaum had never had any other deposit with their firm except the said $540.88, evidenced by paper sued on, and referred to in the written agreement.

Plaintiffs contended:

1. That the plaintiff Anna Flaum, being a married woman at the time she signed the paper herein above set forth, dated March 3, 1886, it was void and of no force and effect as to her.

2. That as this paper was signed and delivered on the 4th of March, 1886, and the note sued on was executed on the 5th of March, 1886, and as neither instrument referred to the other, they were not contemporaneous, and could not be taken as a part of the same transaction.

3. That it appeared that defendants owed the plaintiff, Anna Flaum, $540.88, at the time of this transaction, called by defendants a "deposit," but for which she held their note. And this old note was given up to defendants, and the note sued on was given in its stead. Therefore, there was no pledge or delivery of this money by the plaintiff, Anna Flaum, to defendants, to secure the indebtedness of "Flaum Bros."

4. That had it been a pledge or delivery by the plaintiff, Anna Flaum, to the defendants, to secure the indebtedness of "Flaum Bros." to defendants, that when they executed and delivered the note sued on to the plaintiff, Anna Flaum, it was equivalent to a redelivery of the money to her, and

defendants thereby lost all lien on the same; and so, verbally on the argument, asked his Honor to instruct the jury.

The Court submitted the following issue to the jury: "Are the plaintiffs entitled to recover of the defendants the sum of $540.88, and the interest, being the note sued on, or any part thereof?"

Answer: "No."

There was no objection made to form of the issue, and no other issue tendered by plaintiff.

His Honor instructed the jury as follows:

"If the jury believe that the $540.88, represented by the note sued on, was deposited with the defendants by Mrs. A. Flaum, as security for a credit extended, in consequence of such deposit, to Flaum Bros., her sons, and that said note and the paper-writing put in evidence by defendants are one transaction and agreement, and so intended by Mrs. A. Flaum and her husband and these defendants, and if the jury believe that said debt of Flaum Bros. has never been reduced to $750 at any time since the date of the deposit, and there is and never has been any other consideration for the note sued on, except the $540.88 deposited, as claimed by defendants, in pursuance of the paper-writing, then plaintiffs are not entitled to recover. Burden is on the defendants to satisfy you by preponderance of evidence of the truth of the facts asserted by them. If not so satisfied, you should find for plaintiffs."

Plaintiffs excepted.

The verdict of the jury being for the defendants, and judgment rendered thereon, plaintiffs appealed.

Mr. D. M. Furches, for the plaintiffs.

Mr. W. M. Robbins, for the defendants.

SHEPHERD, J. For the first time, we believe, in this State, is the important question presented, whether a married woman may, with the written consent of her husband,

expressly charge her statutory separate estate by an engagement in the nature of an *executory* contract, where the consideration is not for her benefit, or for the benefit of the estate.

As the writing relied upon by the defendants in this case relates only to money, our decision is applicable to the separate personal estate alone.

It is well established, except in the cases mentioned in *The Code*, §§ 1828, 1831, 1832, 1836 that "at law a *feme covert* is incapable of making a contract of any sort, and any attempt of hers to do so is not simply voidable, but absolutely void. If, however, she be possessed of separate property, a court of equity will so far recognize her agreement as to make it a charge thereon. But even in that case, and in that court, her contract has no force whatever as a personal obligation or undertaking on her part. * * * Nor was there any change wrought in this particular by the alterations made in our court system under the Constitution of 1868, or by the adoption of the statute known as married woman's act. It was in reference to those very alterations, and the effect of the statute, that the Court declared in *Pippen* v. *Wesson*, 74 N. C., 437; *Huntley* v. *Whitner*, 77 N. C., 392, *that no deviation from the common law had been produced thereby as respects either the power* of a *feme covert* to contract, in the nature of her contract, or the remedy to enforce it; that as a contract remedy her promise is still as void as it ever was, with no power in any court to proceed to judgment against her in *personam*." *Dougherty* v. *Sprinkle*, 88 N. C., 300.

The limits, imposed by the Constitution and statute, show clearly, says RODMAN, J., in *Pippen* v. *Wesson*, *supra*, "that the separate estate given (by the Constitution) was such as it had previously been defined to be, to which neither an absolute power of disposition, nor the general power to contract, were necessary incidents. The statute was intended to take the place of a deed of settlement, and must be construed as such deeds had been, as conferring on married

women no powers beyond those expressly given or implied. * * * The draughtsman evidently had in mind the existing law above stated, that no married woman could make any personal contract, but only one to affect or charge separate estate; the object was to require the consent of the husband in lieu of the consent of the trustee, which the law required when the separate estate was created by a deed of settlement. * * * The meaning was not that a married woman may make contracts which, by existing law, she had no power to make, but that she shall not make such contracts as by existing law she had power to make, without the consent of her husband. The intent was not to enlarge her special power by requiring the husband's consent."

This restrictive interpretation of the Constitution and statute, and the assimilation of the statutory to the equitable separate estate, in respect to the incurring of liabilities and their enforcement, have been too long recognized by our decisions to be now regarded as open questions. Whatever doubt may have existed as to the correctness of the construction, it is well sustained by the weight of American authority. Bispham's Principles of Eq., sec. 103; Bishop on Married Women, vol. 2, 211; Pomeroy's Eq. Juris., vol. 3, and many other authors upon the subject.

The principles declared in *Pippen* v. *Wesson*, *supra*, and approved by the Court in *Dougherty* v. *Sprinkle*, *supra*, establish the proposition, *that whenever a feme covert, under the former law, in the absence of any special provisions in the deed of settlement, could, with the consent of her trustee, bind her equitable separate estate, she may now, with the written consent of her husband bind, her statutory separate estate.* Where the case falls within the exceptions mentioned in *The Code*, § 1826, the consent of the husband is not required.

This leads us, therefore, to the consideration of the married woman's capacity to charge, and the manner in which she

may charge, her separate estate, where there is no specific provision in the deed of settlement. Mr. Bishop, vol. 1, sec. 847, well says: "That since the confusion of tongues at the Tower of Babel, there has been nothing more noteworthy, in the same line, than the discordant and ever-shifting utterances of the judicial mind on the subject. * * * True, there has been, sometimes, a language which, though limited in its sphere, was tolerably plain; but no sooner was the language in the way of becoming understood, than, lo! some conquering power of another sort came in, and all was confusion once more." It would be unprofitable, for the purpose of this discussion, to trace the history of judicial decision in England upon this subject. Still less beneficial would it be to attempt to reconcile the conflicting decisions of the American courts. It is but just, however, to remark, that as many of these decisions are based upon dissimilar statutory provisions, their inconsistencies, as to general principles, are often more apparent than real.

MANLY, J., in *Knox* v. *Jordan*, 5 Jones' Eq., 175, says that "this subject has undergone much discussion, and has been variously settled elsewhere, but in North Carolina it is still considered an unsettled question, in many respects. No case has yet gone to the extent of sanctioning the doctrine that, as to the separate property, the married woman is regarded as a *feme sole* in all respects. This seems to be the English doctrine. * * * As we have said, however, we recognize as *settled law* the principle upon which the case of *Frazier* v. *Brownlow*, 3 Ire. Eq., 237, stands, viz.: that a wife may, when not restricted by the deed of settlement, with the concurrence of her trustee, specifically charge her separate estate with her contracts and engagements. *She may incumber expressly, but not by implication.*"

The implication spoken of by the learned Judge means that which, according to the English doctrine, arose simply from the mere fact of contracting a debt, the theory being

that, inasmuch as she could make no personal contract, it logically followed that she must have intended to contract with reference to her separate estate. "The words 'not by implication,' though found in the decision, are not to be understood in the strictest sense as excluding necessary implications (*Withers* v. *Sparrow*, 66 N. C., 169), * * * arising out of the nature or consideration of the contract, showing that it was for her benefit." *Pippen* v. *Wesson, supra*

So, then, it was settled that where there was no such "necessary implication," in order to bind the estate the debt must have been expressly charged upon it. This brings us to the important question which was left open by RODMAN, J., in *Pippen* v. *Wesson*. He says: "We put our decision on the ground that a married woman has no power to contract a personal debt or to enter into any executory contract, even with the written consent of her husband, unless her separate estate is charged with it, either expressly, or by necessary implication arising out of the nature of the consideration of the contract, showing that it was for her benefit. *Whether the contract would be good if it did expressly charge the separate estate, but was not for the wife's benefit, it is unnecessary to say.*" Upon this point we have no direct decisions, but there are *dicta* on both sides.

In *Withers* v. *Sparrow, supra*, it is said that there is now no reason why the English doctrine should not prevail. On the other hand, in *Dougherty* v. *Sprinkle, supra*, it was said that the consideration must be beneficial to the *feme covert*. The only question before the Court was, whether a Justice of the Peace had jurisdiction, and the remark was unnecessary to its determination.

No authority is cited in support of the proposition.

There is also a *dictum* in the same direction in *Rountree* v. *Gay*, 74 N. C., 447, decided at the same term when *Pippen* v. *Wesson* was before the Court, the opinion being delivered by the same Justice. There may be found, in other cases,

general expressions of similar import, but an examination will disclose that they were unnecessary to the decision of the particular question presented.

To the same effect is the intimation of Mr. Malone in his valuable work on Real Property Trials. All of these intimations, it is conceived, were suggested by RODMAN, J., in *Pippen* v. *Wesson*, for none of the previous cases furnish any ground for such a proposition. The learned Judge suggests (for it is but a suggestion) that, inasmuch as resort must be had to a court of equity to enforce the indebtedness, that court will not enforce it unless it was for the benefit of the married woman. No authority whatever from our decisions is cited, for none, we believe, can be found; but he relies upon *Owen* v. *Dickenson*, 1 Craig & Phil., 48 (Cond. Eng. Ch. Reps., 48), and the leading American case of *Yale* v. *Dederer*, 18 N. Y., 265, 22 N. Y, 450. We suppose that these cases were cited in support of the principle that the contracts of a married woman, being void, they could only be enforced in equity. So far from laying down the doctrine that the consideration must be beneficial, they clearly establish the contrary. The English case did not involve the question, the consideration appearing to have been for the benefit of the *feme covert*, but Lord COTTENHAM takes occasion to approve of Lord THURLOW's ruling in *Hulme* v. *Tenant*, 1 Wh. and T. L. C., where the doctrine is broadly laid down, that a married woman can bind her separate estate by her general engagements, and that equity will enforce them.

This jurisdiction by the courts of chancery was not exercised, we think, for the purpose of enforcing merely equitable claims against her, but to give the same effect to her general engagements, *quoad* the separate estate, as the law would have given had she been *feme sole*.

The other case referred to (*Yale* v. *Dederer*) has been the subject of much comment, and occasionally severe criticism. The Court held that where the consideration was not for the

benefit of the wife, the debt must be expressly charged upon her separate estate, and in the same instrument creating the obligation. There was much excitement in the legal mind, both in New York and other States, as to this departure from English rule, and the case was three times before the Court of Appeals, the first appeal having been decided in 1858, and the last, as far as we are informed, in 1877, after *Pippen* v. *Wesson* was decided. The defendant, Mrs. Dederer, executed a note, as surety for her husband, for the purchase of some cows, but she did not, in the note, expressly charge her separate estate.

CHURCH, C. J., in the 68th N. Y., 329, thus summarizes the questions involved and the points decided: "The first time, it was decided that, in order for a married woman to charge her separate estate with a debt not contracted for the benefit of her separate estate, it was necessary that there should be evidence of an intention thus to charge it, and that a note or other obligation was not sufficient evidence. 18 N. Y., 265. On the next trial, it was found that the defendant did intend to charge her separate estate, and this Court held that, when the obligation was in writing, such intention must be expressed in the instrument creating the obligation. 22 N. Y." "That," he says, "was the precise point when the case was last before the Court."

He then affirms the previous rulings, to the effect, as stated in the syllabus, "that in order to charge the estate of a married woman with a debt not contracted for the benefit of her separate estate, the intent to charge such estate, where the obligation is in writing, must be expressed in the instrument."

It is difficult to conceive how such a decision is authority for holding that, when such a debt is *expressly* charged, in writing, upon her separate estate, it is not binding.

Mr. Schouler, Domestic Relations, sec. 143, says: "The principle of the decision was this, that in order to create a

charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract which is the foundation of the charge, or else the consideration must be obtained for the direct benefit of the estate itself." Later New York decisions follow the rule of this case, and require a distinct written obligation to bind the wife, where the debt is not contracted for the direct benefit of the estate.

In the *Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y., 613, the wife indorsed, as surety, the husband's promissory note, as follows: "For value received, I hereby charge my individual property with the payment of this note. (Signed) Armina Babcock." The Court held that this was a charge upon the separate estate, and *Yale* v. *Dederer* was cited as an authority in support of the decision.

Mr. Schouler further says, that "the tendency on both sides of the water is towards the conclusion, that the debts of a married woman having separate property are only surely charged by a court of equity upon that separate property, and payment enforced out of it, when they are contracted by her for its benefit, or expressly made a charge thereon, or expressly contracted on its credit, and, of course, to the extent only to which the wife's power of diposal may go." * * *

"Benefit is not the sole test; but to the extent of her power of disposition over her separate estate, the wife may charge it with such engagements as she sees fit to make, provided the evidence of intention be satisfactory (upon which point States differ), and provided, of course, that the transaction was voluntary on her part and not fraudulently procured."

Bishop, *supra*, vol. 1, sec. 872, quotes, with approval, the language of HARRIS, J., in *Yale* v. *Dederer*, 18 N. Y., 265–283, that what will constitute a charge on the estate "is simply a rule of evidence. All agree that when the wife has expressly

charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid and will be enforced."

In *Stephen* v. *Beall*, 22 Wallace, 329, the Supreme Court of the United States says that "the doctrine that a married woman has the power to charge her separate estate with the payment of her husband's debts, or any other debts contracted by her as principal or as surety, has been uniformly sustained for a long period of time. *Hulme* v. *Tenant*, 1 Brown's Ch. Cases, 16; *Standford* v. *Marshall*, 2 Atkyns, 69; *Bullpin* v. *Clarke*, 17 Ves, 365; *Jaques* v. *Methodist Church*, 17 Johns., 548; *Yale* v. *Dederer*, 22 N. Y., 456; same case, 18 N. Y., 276; *Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y., 615; Story's Eq., secs. 1396–1401. The question has been, in respect to the manner in which the conceded power should be exercised and in respect to the requisite evidence of its due execution."

To the same effect is *Radford* v. *Carwile*, 13 W. Va., 572, which is an able and exhaustive review of all of the authorities upon the subject. Also *Hall* v. *Eccleston*, 37 Md., 510; *Elliott* v. *Gower*, 12 R. I., 79; *Wooden* v. *Perkins*, 5 Gratt., 345; *Heburn* v. *Warner*, 112 Mass., 271; *Williams* v. *Hugunin*, 69 Ill, 214; *Willard* v. *Eastham*, 15 Gray, 328; *Hodson* v; *Davis*, 43 Ind., 228.

These authorities, and many others which could be cited, abundantly show that a "beneficial" consideration is not necessary where the wife expressly charges separate estate.

As we have said, we have in this State no decision directly in point. In *Frazier* v. *Brownlow*, 3 Ired. Eq., 237, the English rule was approved. RUFFIN, C. J, says, that Lord ELDON approved of the decree in *Hulme* v. *Tenant*, *supra*, on the ground that the "intention to contract with reference to the separate estate of the wife was to be implied from the circumstances of her joining the husband in one bond and giving another solely. And he lays down the doctrine,

which seems to have been generally adopted in succeeding cases, that the separate property is liable only to a person contracting with her, not as a married woman merely, *but as a married woman having a separate estate.* In other words, the engagement must be contracted with reference to the separate property, either express or presumptive. All admit that, if clearly so contracted, in reference to the seperate property of a *feme covert* and upon the faith of it, her engagements must be answered out of her separate personal property."

The doctrine thus laid down is distinctly approved as we have seen, in *Knox* v. *Jordan, supra,* with the modification that the estate cannot be charged by implication merely. It is there distinctly said that, "she may alien or incumber it (the separate estate) in the execution of powers conferred on her by the terms of the trust, and if not restricted by the terms, may, under the authority of *Frazier* v. *Brownlow,* charge the income or profits with the payments of debts, *or appropriate them to any selected object,* provided such charge or appropriation be specific and unequivocal and concurred in as before stated." In that case (*Knox* v. *Jordan*) the wife signed a note as surety for her husband, and the bill was dismissed because there was no express charge upon the separate estate. No point was made as to the consideration, and we think, from what was said by the Court, that had the debt been "specifically" charged with the consent of her trustee, the Court would have enforced its payment. Indeed, the reasoning of the Court, in view of the authorities, can lead us to no other conclusion.

The words "specifically charged," as used in the opinion, are synonymous with *expressly charged.* They cannot mean that the charge must be upon *specific property,* for such was not the character of the charge in *Frazier* v. *Brownlow,* which case was approved, with the modification mentioned in *Knox* v. *Jordan.*

Sustained, as we are, by this great weight of authority, we conclude that the wife may, with the written consent of her husband, expressly charge her statutory personal separate estate by her engagements in the nature of executory contracts, *although the consideration does not inure to her benefit or that of the estate.* The intent to so charge must, in such cases, appear in the instrument creating the liability.

This applies also to the equitable separate estate, which may, with the concurrence of the trustee, where such concurrence is required, be charged to the extent of the power of disposition conferred by the deed of settlement. Of course, where there are limitations or other special provisions, these must be strictly pursued. *Hardy* v. *Holly*, 84 N. C., 661.

In the enforcement of these charges no peculiar efficacy is given to writings under seal, as *at law* the *feme covert* is incapable of making such executory contracts. The Court will, in all cases, look into the consideration, and if it be such as would sustain an action upon a contract made by a person *sui juris*, it will be sufficient.

The complaint should allege that the wife has a separate estate, subject to the charge, and the execution can issue against that alone. *Dougherty* v. *Sprinkle*, *supra.*

The wife can claim the same exemption from execution as she would be entitled to if she were *feme sole.*

We are not authorized by the facts of this case to say what effect such executory engagements may have upon the separate real estate of the wife, where there has been no specific charge by way of mortgage or other conveyance. This point was not passed upon in *Arrington* v. *Bell*, 94 N. C., 247, and is still an open question.

The application of the principles we have laid down to the case before us, is quite clear.

Much was said on the argument about the money in the hands of the defendants having been pledged, and it was

contended that the execution of the note sued upon was a waiver of the lien. The deposit, it appears, was general, and could not be the subject of a pledge in the strict technical sense.

The writing signed by the plaintiff and her husband, therefore, was an executory agreement, upon sufficient consideration, that the defendants should retain the money in their hands as a security for the goods sold to the sons of the *feme* plaintiff. It was an express charge upon the money on deposit. Whether the transaction amounted to a pledge or not, the giving of the note could not have the effect of defeating the defendants' rights, if, as they contend, it was intended merely as an evidence of the "deposit." Such was the effect of the testimony of William Wallace, apparently the only witness examined, and we think that the testimony was properly admitted.

The note is a *simple contract*, and as between the parties the consideration was open to inquiry.

The testimony was clearly competent to show, either that there was no consideration, or that the consideration was the "deposit," the subject of the agreement relied upon by the defendants. It was also competent, as we have remarked, to show that the note was given simply as an evidence of the deposit

When the consideration was thus impeached, it was incumbent on the plaintiff to have shown some other sufficient consideration. *Aldrich* v. *Stockwell*, 9 Allen, 45

This she failed to do, and as the only consideration shown having been found by the jury to be the subject of the agreement mentioned, it follows that the plaintiff is not entitled to recover.

If the instrument sued upon had been a bond, a more difficult question of evidence would have been presented.

The view we have taken disposes of the exceptions to the admission of testimony, and to the failure of the Court to instruct the jury as requested.

The charge of his Honor was, perhaps, more favorable to the plaintiff than she was entitled to, and we are of the opinion that there is no error.

No error. Affirmed.

J. A. CONANT and wife v. W. W. BARNARD, Trustee, et al.

Practice—Demurrer.

1. Where all the defendants join in a demurrer to the complaint, upon the ground that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to *any one* of the defendants.
2. The same defendants may demur to one and answer as to another of two or more causes of action in one complaint; or, as to a single cause of action, some defendants may answer and some may demur, and the issues of law will, in either event, be so raised as to require the Court to pass upon them.

CIVIL ACTION, tried before *Boykin, J.*, at August Term, 1888, of BUNCOMBE Superior Court.

The plaintiffs in this action were J. A. Conant and his wife Genevieve R. Conant; the defendants were T. I. Van Gilder and his wife, W. W. Barnard, trustee under two deeds of trust made to him by said Van Gilder and his wife, and the *cestui que trust* named in said deeds of trust to Barnard.

The complaint alleged, in substance, that the defendant T. I. Van Gilder had agreed to borrow of the plaintiff Genevieve R. Conant fifteen thousand dollars, and to secure the same by a conveyance of certain real estate (particularly

described in the complaint) to her husband and co-plaintiff J. A. Conant in trust to sell, &c., in case of default in payment of the amount to be borrowed.

That the money was lent and a deed of trust was executed to G. R. Conant by said Van Gilder and his wife, whereby a part only of the property agreed to be conveyed was actually conveyed, the most valuable part of such property being left out of the deed through the mutual mistake of all parties to such deed, and by reason of the ignorance and unskillfulness of the draughtsman, the deed, through a like mistake, &c., was made to G. R. Conant instead of to J. A. Conant, as it was agreed it should be, and recited and purported to secure an indebtedness to J A. Conant instead of to G. R. Conant, as it should have done. The deed thus drawn was duly probated and recorded.

That thereafter the defendant Van Gilder and his wife made two other deeds of trust to the defendant Barnard for the purpose of securing a number of debts owing by said T. I. Van Gilder, as an individual and as a member of a copartnership, to a number of persons mentioned in the deeds of trust (all of whom were made parties defendant in this action), said deeds of trust to Barnard being made for no other purpose and upon no other consideration than the securing of such debts, and without payment to the said T. I. Van Gilder and his wife, or either of them, of any other consideration by said Barnard or any other person. These deeds of trust to Barnard embraced all the land which said Van Gilder had agreed to convey to J. A. Conant, as well as that actually conveyed to said G. R. Conant. Both these deeds of trust to Barnard were duly probated and recorded, and all the debts thereby secured were contracted and existing before such deeds were executed.

That at the time these deeds of trust were made by Van Gilder and wife to Barnard the said Barnard and some of the *cestui que trusts* (naming certain of them) had notice of

said agreement on the part of Genevieve R. Conant to lend fifteen thousand dollars to T. I. Van Gilder, to be secured by deed of trust upon the lands so agreed to be conveyed, and had actual notice that said loan had been so made and a deed of trust made by Van Gilder and wife to G. R. Conant to secure the same, and that said deed was by all the parties thereto believed to comply entirely with said agreement, and to embrace all said lands so agreed to be conveyed.

The plaintiff's demanded judgment that the deed of trust to G. R. Conant be amended, corrected and reformed so as to conform to the agreements and understandings between the parties thereto, and that it be declared a first lien on all the land which should have been embraced in it, and to have priority and precedence over said conveyances to Barnard, and for other and further relief, &c.

All the defendants joined in the following demurrer to the complaint:

"Defendants demur to the plaintiffs' complaint, and, for cause of demurrer, show:

"That said complaint does not state facts sufficient to constitute a cause of action, in that—

"1. It appears upon the said complaint that the two deeds to W. W. Barnard, and the declarations of trusts by him, were duly executed and registered, and defendants thereby acquired vested rights, of which equity will not deprive them at the instance of the plaintiffs, who are also creditors of the common debtor.

"2. It appears upon the complaint, that at the date of the execution and registration of the two deeds to W. W. Barnard, and of the declaration of trust by him, there was no incumbrance upon the land therein conveyed except that portion thereof described in plaintiffs' deed in trust, and that defendants, by their registration, as creditors, acquired a first lien upon said land other than that described in plaintiffs' deed in trust.

"3. It appears from the complaint that the fact, as to what land was intended to be conveyed in plaintiffs' deed in trust, was well known to all the parties to the transaction, and also as to who should be trustee and who *cestui que trust* therein, and it was plaintiffs' negligence that they did not have the deed in trust so drawn, and is not such a mistake as equity will relieve against, especially where, by so doing, it would deprive the defendants, who are creditors, of vested rights subsequently acquired.

"4. It appears upon the complaint that plaintiffs accepted the deed in trust as it was drawn, and caused the same to be registered, and that defendants have acquired legal rights by their registration. And equity will not now deprive defendants of their right by putting in the plaintiffs' deed in trust land not conveyed therein, and upon which defendants have acquired rights and liens to secure their debts.

"5. That the complaint does not allege that some of defendant creditors had notice of the mistake sought to be corrected."

There was judgment that the demurrer be overruled and that the defendants have leave to answer. Thereupon, defendants appealed.

Mr. F. A. Sondley, for the plaintiffs.

Messrs. W. W. Jones, Theo. F. Davidson and *Chas. A. Moore*, for the defendants.

AVERY, J. The complaint states facts sufficient to constitute a cause of action as to T. I. Van Gilder. Counsel for all parties represented in this Court concede that this is true. When the defendants united in a demurrer, on the ground that the complaint did not state facts sufficient to constitute a cause of action, they all placed themselves in the same boat, and must sink or swim together. The current of authority is in favor of this just and salutary rule of plead-

ing, where the new system has been adopted. "A demurrer by two or more, if there is a cause of action against one of them, will be overruled." Bliss on Code Pl., sec. 414 and note. This view is supported by other authorities. Tillinghast & Sherman's Pr., vol. 2, p. 127; *McGeneghand* v. *Cotten*, 32 Wis., 614; *Shore* v. *Taylor*, 46 Ind., 343; Whitaker's Pr., vol. 2, p. 169; *People* v. *The Mayor*, 28 Barb., 240; *Goncelier* v. *Foret*, 4 Minn., 1; *Christian* v. *Crocker*, 25 Ark., 327; *Peabody* v. *Insurance Co.*, 20 Barb., 339.

Pomeroy, in his work on Remedies and Remedial Rights, distinctly states the rule that, "where a demurrer is filed to several causes of action, or to more than one defence, on the ground that no cause of action or no defence is stated, if there is one good cause of action in the one case, or one sufficient defence in the other, the demurrer must be overruled."

The author adds, in that connection, "the same rule also applies to a demurrer for want of sufficient facts by two or more defendants jointly; it will *be overruled as to all who unite in it*, if the complaint or petition *states a good cause of action against even one of them.*" Section 577.

The author adds that a different rule has prevailed in some States, but cites only a case from Nevada sustaining the view that the demurrer may, in such cases, be sustained as to some and overruled as to others of the parties uniting in it.

This rule seems to have prevailed in courts of equity under the former practice. The defence that a bill did not state facts sufficient to constitute a cause of action was set up in a court of equity by a demurrer for want of equity to the whole bill. Under the practice that prevailed in the courts of equity in this State, where a defendant filed a demurrer to the whole bill, and the bill showed the plaintiff's right to any relief, if true, the demurrer was overruled, "for," said the Court, "it cannot be held bad in part and good in part." *Thompson* v. *Newlin*, 3 Ired. Eq., 338. In

Barnawell and wife v. *Patrick Threadgill et al.*, 5 Ired. Eq., 86, the suit was brought against six defendants, all of whom joined in the demurrer. Chief Justice RUFFIN, for the Court, says: "We say the demurrer must be overruled at all events, because enough appears to entitle the plaintiff, if true, to a decree as to the several negroes conveyed or sold to Thomas and Gideon B. Threadgill; and, therefore, this joint demurrer of the defendants to the whole bill (except the formal charge of combination) will not lie. For it is the general rule, that a demurrer must be good throughout, and that if it cover too much it must be overruled *in toto*." The demurrer on the ground that a complaint does not constitute facts sufficient to constitute a cause of action "is a substitute for the old general demurrer, and is still generally called a general demurrer." Bliss on Code Pl., sec. 413.

The general rule seems to be that *The Code* practice rejects pleadings at law, and adopts those in equity by demurrer and answer. *Ransom* v. *McCless*, 64 N. C., 17. But the practice is of course modified by express provisions of *The Code*, not declaratory of any rule formally followed in either Court.

In *Cowand* v. *Meyers*, 99 N. C., 198, this Court reiterates the principle that, if there is only one cause of action stated in the complaint, "a demurrer must be to it as a unity or it will be disregarded." This construction of *The Code* (§ 246) proceeds upon the same principle on which it has been held, in affirmance of the old practice, that one who demurs on the ground that the complaint does not state facts sufficient to constitute a cause of action, must fail, if it appear either that the cause of action is sufficient as to one of many defendants, joining in the demurrer, or that one of several causes of actions, embodied in the complaint, is sufficient as to one or more of those joining in the demurrer. The same defendants may demur, on this ground, to one and answer as to another of two or more causes of action in one complaint, or as to a single cause of action some defendants may

answer and some may demur, and the issues of law will, in either Court, be so raised as to require the Court to pass upon them.

The plaintiff cannot recover a sum in excess of that demanded in the complaint without amendment. Apart from this restriction, any relief may be granted consistent with the case made by the complaint and embraced within the issue. *Jones* v. *Mial*, 82 N. C., 252. As the complaint, uncontradicted, would entitle the plaintiff to judgment against Van Gilder, we deem it unnecessary to decide the points discussed in the briefs of counsel, and it would not be proper to do so after cutting short the discussion, by a suggestion that the cause, as now constituted in this Court, must depend upon the single question, whether the complaint, if admitted by Van Gilder, would entitle the plaintiff to judgment against him. There is no error. The judgment is affirmed.

No error. Affirmed.

W. A. GIBSON v. H. C. BARBER and wife.

[For syllabus, see same case in 100 N. C., p. 192.]

CIVIL ACTION, tried before *Merrimon, J.*, at February Term, 1889, of the Superior Court of RICHMOND.

Mr. C. W. Tillett, for the plaintiff.
No counsel for the defendants.

SHEPHERD, J. When this case was last before the Court (100 N. C., 192), it was held "that so much of the proceeding as looks to an adjustment of controversies arising out of the administration of the whole trust estate, by the mortgagees, and beyond that which belongs to the land, must be declared to be erroneous, and is reversed." "The cause," says the Court, "will proceed in the Court below in accordance with the law as declared in this opinion." It was also held that the plaintiff, by his purchase, took the legal estate, subject to the right of the defendant to redeem, and that the judgment should have directed that, if the indebtedness was not paid by a day certain, the land should be sold.

We have examined the judgment of his Honor, and it seems to be fully sustained by the principles stated in the opinion. No error was pointed out by counsel, and we are unable to find any. The judgment is affirmed.

No error. Affirmed.

THE STATE v. JOHN GOLDSTON.

Indictment — Form — Matter relating thereto — Assault with Intent to Commit Rape, &c. — The Code, § 1102.

1. Every indictment should charge *all* the essential elements of the offence intended to be charged: and when the *intent* with which an act is committed is one of the essential elements of the offence, the word "*intent*" should be used in the indictment, though possibly some equivalent expression would suffice in its stead.

2. An indictment charging that the defendant did make an assault upon a female child under ten years of age, and did unlawfully *attempt* to carnally know her, &c., does not sufficiently charge an assault with intent to commit a rape, &c., under § 1102 of *The Code*.

3. But such indictment sufficiently charges, and the defendant could be convicted of, a simple assault.

4. An assault with intent to commit rape being a misdemeanor, in an indictment for the offence the defendant may be convicted on a single count of a simple assault; but it would be otherwise if the offence charged were a felony.

ASSAULT WITH INTENT TO COMMIT RAPE, tried before *Merrimon*, *J.*, at Spring Term, 1889, of the Superior Court of MOORE.

The indictment charges that the defendant, "with force and arms, at and in," &c., "on," &c., "in and upon one Mittie McKay, she being a female child under ten years of age, unlawfully and wilfully did make an *assault*, and did then and there unlawfully *attempt* to carnally know the said Mittie McKay, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State."

Upon the plea of not guilty to this indictment, on the trial, there was a verdict of guilty. The Court, on motion, arrested the judgment, upon the ground that the indictment was fatally defective, in that it failed to charge that the

defendant assaulted the child therein named "with intent feloniously to carnally know," &c. The Court further decided, that the defendant was by the verdict found guilty of that offence, and not of a simple assault, and that the indictment was not framed with a view to charge, nor did it charge, a simple assault, because it did not charge that force was used, or that there was an attempt to use it. The Solicitor insisted that it sufficiently charged an assault with intent to carnally know, &c. The case settled on appeal states that "there was no evidence that he (the defendant) used any violence," and that "that there was evidence tending to show that she (the child) consented."

The Solicitor for the State, having excepted, appealed from the order arresting the judgment to this Court.

The Attorney General, for the State.

Mr. A. C. Gilbert and *Mr. W. E. Murchison* (by brief), for the defendant.

MERRIMON, J. The statute (*The Code*, § 1101) prescribes that "every person who is convicted of ravishing and carnally knowing any female of the age of ten years or more, by force and against her will, or who is convicted of unlawfully and carnally knowing and abusing any female child under the age of ten years, shall suffer death." It is a settled construction of the latter clause of the statute, that to carnally know and abuse any female child under ten years of age, whether she consents to such carnal knowledge or not, is rape. *State* v. *Johnston*, 76 N. C., 209; *State* v. *Dancy*, 83 N. C., 608.

The same statute (*The Code*, § 1102) further prescribes that "every person convicted of an assault with intent to commit a rape upon the body of any female, shall be imprisoned in the penitentiary not less than five nor more than fifteen years." The defendant is indicted under this section of the statute, "for the assault with *intent*

to commit a rape." The indictment does not charge that offence sufficiently, because it fails to charge the *intent* with which the assault was made. It is essential that such intent shall be charged—the offence is not complete without it—and the indictment is bad when it fails to charge all the essential elements of the offence intended to be charged. *State* v. *Moore*, 82 N. C., 659; *State* v. *Russell*, 91 N. C, 624.

The indictment seems to have been prepared hastily and incautiously. It does not charge an "assault with intent," &c., but it charges that the defendant "did make an assault *and* did then and there unlawfully attempt," &c.—that is, did some act towards committing a rape; but the act is not the intent, though it may be evidence of it. The intent is the fixed purpose of the mind in connection with the assault. This the statute makes an essential element of the offence, and it—not the evidence of it—must be charged. It is possible that some other word or expression would suffice as a substitute for the word "intent," as employed in the statute, but it is an expressive, precise word, well understood and much used in statutes, and it is not at all safe for pleaders to omit it in all proper connections. The charge should be, "with intent, feloniously," &c. *State* v. *Martin*, 3 Dev., 329; *State* v. *Scott*, 72 N. C., 461; *State* v. *Jesse*, 2 D. & B., 297.

The Court, therefore, properly held that the indictment did *not* sufficiently charge an "assault with intent to commit rape." But we are of the opinion that it erred in holding that it did not sufficiently charge a simple assault, and that the defendant could not, upon it, be convicted of that offence, if the evidence should satisfy the jury of the defendant's guilt.

It is charged that the defendant, "with force and arms, at," &c., "on," &c., "in and upon one Mittie McKay * * * did make an assault * * * against the peace and dignity of the State." Thus an assault is charged. The words of the indictment omitted may be treated—indeed, they are sur-

plusage, mere redundant matter—as serving no material purpose; nor do they materially, if at all, embarrass the defendant in making his defence in this action, nor could they in case of a subsequent prosecution for the same offence. The Court and the defendant can see that an assault is charged, and no other offence is charged sufficiently. The term *assault* in the connection as charged, *ex vi termini*, implies the offence without additional words explanatory of how the force was manifested or employed. 2 Bish. Cr. Pro., § 65; Whar. Prec., 114, and notes; *People* v. *Pettit*, 3 Johnst., 511; *State* v. *Buch*, 25 Vt., 373; *Bloomer* v. *The State*, 3 Sneed, 66; *State* v. *The Commonwealth*, 11 Seargt. & Rawl., 177.

What we have thus said rests upon the ground that a simple assault is charged. But if the indictment had sufficiently charged an assault with intent to commit a rape, the defendant might have been convicted of a simple assault, if the evidence would have warranted such conviction. The offence of assault with intent to commit a rape is but an aggravated misdemeanor, and if the evidence failed to warrant a conviction for that offence, the defendant might, in the same action, on the single count in the indictment, be convicted of the offence included in it—the simple assault. *State* v. *Upchurch*, 9 Ired., 454; *State* v. *Clark*, 7 Jones, 167; *State* v. *Durham*, 72 N. C., 447; *State* v. *Perkins*, 82 N. C., 681.

It would be otherwise, however, if the principal offence were a *felony*, embracing others of a less grade. *State* v. *Arrington*, 3 Murph., 571; *State* v. *Durham, supra*; *State* v. *Perkins, supra*. "The reason for the distinction seems to be, that an acquittal of a felony is no bar to another indictment for the same act charging it as a misdemeanor."

If, therefore, in the present case, there was evidence of an assault, the Court should have instructed the jury that they might find the defendant guilty of that offence.

The case settled states that there was no evidence that the defendant used any violence, and that there was evidence tending to prove that the child consented to what he did, whatever that was. What he did to or towards the child does not appear. The statement that there was no evidence that the defendant used violence, seems to imply that there was no evidence that he seized the person of the child. Still, there may have been evidence of an assault, and the fair inference is, that there was, as the jury rendered a verdict of guilty. And it may be that the jury did not believe the evidence tending to prove that the child so consented; moreover, there may have been evidence to the contrary; the case does not state that there was not. Indeed, it is apparent that the Court did not regard or view the evidence tending to prove a simple assault, nor did it deem it proper to submit it to the jury for that purpose. The clear opinion of the Court was, that defendant could not be convicted in this action for an assault.

There is, therefore, error. As the Court discovered, on hearing the motion to arrest the judgment, that the indictment failed to charge the more serious offence intended to be charged, if there was evidence produced on the trial from which the jury might have found defendant guilty of a simple assault—as it seems there was—it should have set the verdict aside and directed a new trial, to the end that the issue, whether the defendant was guilty of a simple assault or not, might be tried, and the case disposed of according to law.

To that end, the order arresting the judgment must be set aside, and likewise also the verdict of guilty, and a new trial directed and had.

Error. New trial.

STATE v. LEVI HARGRAVE.

False Pretence—Obtaining Property from A with Intent to Defraud B.

1. The prisoner being entitled to a claim against the county, for witness fees, assigned it to C.; the claim was allowed by the commissioners, who directed the Register of Deeds to issue a county order for it. The prisoner falsely stated to the Register's clerk that he had not assigned his claim, and that he was entitled to the county order, and by means of such false statements obtained the order. The prisoner being indicted for obtaining property under false pretences, it was proper to charge the jury that if they believed, beyond a reasonable doubt, that the prisoner fraudulently, designedly, knowingly and falsely represented to the Register's clerk, whether the representations were by words or acts, that he had not assigned his claim to C., and that he was the owner of the order, when, in truth and in fact, he was not, and that by reason thereof he obtained the order from such clerk, he was guilty.

2. A county is discharged from liability for a witness' fees by paying them to the person who appears to be entitled thereto, upon the witness' ticket and bill of costs made out by the Clerk of the Court, although the Clerk of the Court had notice that the claim had been assigned by the witness to another person. If forgery, upon an indictment against the witness for obtaining the county order, issued in payment of his fees, by false pretences, it was proper to charge in the bill that the act was done with intent to defraud C.

3. An indictment charging that the prisoner obtained goods, &c., from A. by reason of false pretences made to A., with intent to defraud B., will be sustained under our statute although the relation of principal and agent did not exist between A. and B.

CRIMINAL ACTION, tried before *Phillips, J.*, at December Term, 1885, of HAYWOOD Superior Court.

The bill of indictment is set out in the opinion of the Court.

A. T. Cle-Hisher, a witness for the State, testified that the defendant assigned to him in writing the claim which he

(defendant) had in the case of the State *v.* Mebane; that witness let defendant have goods to the value of $2.15, in consideration of such assignment, and filed the assignment with the Clerk of the Superior Court. It was shown that the assignment was afterwards lost.

R. M. Leonard corroborated the testimony of Clodfelter.

The Deputy Superior Court Clerk testified that the assignment above mentioned was presented to him, and he entered on the judgment docket that the claim of defendant for services as a witness in the State *v.* Mebane was to the use of Clodfelter; that Mebane was released under the insolvent debtor's act, and that one-half of the claim of defendant was allowed by the County Commissioners.

It was shown that W. N. Kinney was the deputy and agent of the Register of Deeds, authorized to act for him in settling claims against the county.

W. N. Kinney testified that he, acting for the Register of Deeds, delivered the order set out in the bill of indictment to the defendant. "The bill of costs in State *v.* Mebane, (brought) to our office and allowed by Commissioners, did not show Levi Hargrave's claim marked to use of Clodfelter. I had never seen the assignment. Clodfelter came to me the day before I gave the order to defendant, and asked me if I had his claim in the Mebane case. I told him there was no claim there for him. Asked him if he had an assignment. He had none. I asked defendant in my office the next day if he had assigned his order to Clodfelter, and he said he had not, and that it was his claim. I gave him the order, and he gave me the receipt." (Defendant's receipt for the order was shown in evidence.)

On cross-examination, witness said: "I recollect calling defendant's attention to the fact that Clodfelter had called and said he had a claim in the Mebane case, and called for it. I told him the order was not made in the name of Clodfelter. The claim in the bill of cost sent from Clerk's office

was not to the use of Clodfelter. When the bill of costs sent from Clerk's office says to the use of anyone, I make out the order to the use of that one. It is the custom, when a claim is assigned, to have it marked to the use of the one to whom it is assigned: * * * I gave the defendant the order because it was made out to him, and took his receipt."

The County Treasurer testified that he had paid the order described in the indictment to the defendant.

The defendant demurred to the evidence, and asked the following instructions to the jury, which were refused:

"1. (This prayer is copied in the opinion.)

"2. (This prayer is given, in substance, in the opinion.)

"3. (This is copied in the opinion.)

"4. If the jury believe that Kinney issued the order produced in evidence, to the defendant, for the reason that the bill of costs sent to the Register's office from the Clerk Superior Court's office did not show any assignment to the use of Clodfelter, and that the order was accordingly made out in the name of defendant, they must acquit defendant.

"5. If the jury believe that, at the time Kinney issued the order to the defendant, he knew or had been notified by Clodfelter that the defendant assigned his right to the witness ticket, mentioned in the evidence, to Clodfelter, they cannot convict the defendant."

After recapitulating the evidence and explaining the offence of false pretence, as defined in *State* v. *Phifer*, his Honor gave the instruction which is set out in opinion of the Court.

There was a verdict of guilty, whereupon defendant moved for a new trial, upon the grounds, that the instructions asked were not given; for error in the charge, as given; and "because the Court submitted the question of guilt to the jury, when, on the demurrer to the evidence, he should have directed the jury either to return a verdict of guilty or not guilty, as he thought right, on the evidence."

Motion for new trial overruled; judgment against defendant, and he appealed.

Attorney General, for the State.
No counsel for the defendant.

AVERY, J. The bill of indictment was as follows:

"STATE OF NORTH CAROLINA, } Superior Court,
"Davidson County. } Sept. Term, A. D. 1888.

"The jurors for the State, upon their oath, present: That Levi Hargrave, late of the county of Davidson, on the fifth day of July, in the year of our Lord one thousand eight hundred and eighty-eight, at and in the county of Davidson, unlawfully and knowingly, intending and devising to cheat and defraud A. L. Clodfelter of his goods, moneys, chattels and property, did, then and there, unlawfully, knowingly, and designedly falsely pretend to W. N. Kinney, clerk and agent of F. R. Loftin, County Register of Deeds of said county, that he, said Levi Hargrave, was the owner and entitled to the proceeds of a certain county order, which is as follows, that is to say:

"$2.10. OFFICE BOARD OF COUNTY COMMISSIONERS,
"DAVIDSON COUNTY, N. C., July 3, 1888.

"*Ordered*, That the County Treasurer pay Levi Hargrave two dollars and ten cents for half fees, State *v.* Wm. Mebane.

"A true copy:
"No. 271. F. R. LOFTIN.

Whereas, in truth and in fact, he, the said Levi Hargrave, was not the owner and entitled to the possession and proceeds of the said order, he, the said Levi, having long before that time assigned his right, title and claim thereto for value

to the said A. L. Clodfelter, as he, the said Levi Hargrave, then and there well knew, by color and means of which said false pretence and pretences, he, the said Levi Hargrave, did then and there unlawfully, knowingly and designedly obtain from the said W. N. Kinney, clerk and agent as aforesaid of the said County Register of Deeds, the said order for the said $2.10, being then and there the property of the said A. L. Clodfelter, with intent to cheat and defraud the said A. L. Clodfelter, to the great damage of the said A. L. Clodfelter, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State.

(Signed) LONG, *Solicitor.*"

The defendant was a witness in a criminal prosecution and proved a ticket for four dollars and twenty cents, and the costs having been taxed against the county of Davidson, was entitled to half the amount from the county. He assigned this claim against the county to one A. L. Clodfelter, and received from him goods to the amount due on the order from the county. Clodfelter gave the writing to one Moyer, deputy of the Clerk of said Court, who marked the defendant's witness ticket as transferred to the use of Clodfelter. The defendant told Clodfelter that half the charges were due him from the county, and thereupon the latter gave him meat, flour, &c., out of his store to the value of two dollars and ten cents, and took the assignment. The claim was audited and allowed by the Board of County Commissioners, and W. N. Kinney, who was Register of Deeds and *ex-officio* Clerk of the Board, was empowered by the Board to deliver an order to the County Treasurer to pay the amount due to the owner. The Clerk of the Court or his deputy lost the assignment, and therefore failed to notify the Board of Commissioners or their Clerk of the transfer of the ticket, or to make the fact of the assignment appear in the bill of

costs sent to the Board to be audited. Clodfelter notified Kinney that the claim had been assigned to him, and was told by the latter that there had been no previous notice of the transfer. Clodfelter went again to the Clerk of the Court to find the written assignment. Before Clodfelter again applied to Kinney for the amount due on the witness ticket, the defendant had told Kinney that he had not assigned the claim to Clodfelter, and that he was still the owner of it, and, as Kinney testified, he had been induced by that representation to give defendant the order incorporated in the bill of indictment. The defendant collected the amount due on the order from the County Treasurer.

The defendant told W. N. Kinney, Register of Deeds, who was charged by the Board of County Commissioners with the duty of issuing drafts to the County Treasurer to pay claims, audited and allowed by said Board, that he was entitled to receive an order for two and $\frac{10}{100}$ dollars, allowed on a witness ticket previously proven by defendant, and that he had not assigned the said ticket. This representation was false, for he had already transferred the ticket, in writing, to A. L. Clodfelter, and received goods for it. If Kinney was induced by the falsehood to deliver the order set out in the bill of indictment, the defendant obtained something of value from Kinney. Being, therefore, a false representation of a subsisting fact, calculated to deceive, and which did deceive, whereby the defendant obtained the order mentioned (which was property), his Honor did not err in overruling the demurrer to the evidence, and in refusing to give the first instruction asked, which is in the following language: "There is no evidence sufficient to go to the jury, that the defendant obtained the order, produced in evidence, from Kinney by any false and fraudulent representations, and, therefore, they must acquit the defendant." The representation was calculated to deceive, because the Clerk had, by

accident, mislaid the assignment, and Kinney had no evidence in his office of the fact that Clodfelter was the real owner.

After recapitulating the evidence and explaining the offence of false pretence, as defined in the case of *State* v. *Phifer*, his Honor instructed the jury as follows: "If the jury believe, beyond a reasonable doubt, that the defendant, Levi Hargrave, fraudulently, designedly, knowingly and falsely represented to W. N. Kinney, whether such representations be in words or acts, that he had not assigned his claim to Clodfelter, and that he was the owner of the order, when in truth and in fact he was not, and that by reason thereof he obtained the order from Kinney, he must be guilty. If the jury are not so sati-fied, they must acquit."

We think that the instruction given was substantially in compliance with the law, as stated in *State* v. *Dixon*, 101 N. C., 741; *State* v. *Wilkerson*, 98 N. C., 696, and *State* v. *Phifer*, 65 N. C., 321. The question of *scienter* was distinctly left with the jury, and they, under the instruction, passed upon every matter material in arriving at a conclusion as to defendant's guilt.

The second paragraph of the prayer, solicited for defendant, was a request to the Court to tell the jury that there was no evidence that the claim was assigned to Clodfelter, when the latter and the witness Leonard had both testified that an assignment in writing was signed by defendant in their presence. We do not understand the request to suggest a doubt as to whether the defendant could lawfully transfer such a claim in the manner described by the witnesses. That question is settled, however. *Harris* v. *Burwell*, 65 N. C., 584; *Havens* v. *Potts*, 86 N. C., 31.

The question (raised by the third paragraph of the instructions asked) whether Kinney issued the order, because the bill of costs sent over from the Clerk's office contained no notice of the transfer, or because of the representation by

the defendant that he was the owner of the claim, was fairly submitted to the jury. Under the instruction given they could not have found the defendant guilty without being fully convinced, from the testimony, that he obtained the order only by falsely representing that he was the owner. The Judge was not bound to give instructions in the words of counsel. *Brink* v. *Black*, 77 N. C., 59. We do not think that it was material whether Kinney was told by Clodfelter of the assignment of the latter, and the fact could only be considered by the jury as determining what means operated on Kinney's mind and induced him to deliver and issue the order. We see no error in the refusal to give the jury the charge requested in the fifth paragraph of instructions asked. The jury declared by their verdict, in the light of the testimony and the instruction given, that they were satisfied, beyond a reasonable doubt, that the order was obtained by means of the falsehood told by the defendant to Kinney.

Paragraph three of the prayer submitted was as follows: "The bill of indictment charging that A. L. Clodfelter was cheated and defrauded, and the evidence being that the county alone, if anybody, was cheated and defrauded, the jury should acquit the defendant." The point raised was, whether the Court should have held that there was a fatal variance between the charge and the evidence, and directed a verdict of not guilty to be entered on that ground. The Board of County Commissioners exercise all of the powers granted to the county as a municipal corporation, and are the only persons through whom the corporation can be sued. *The Code*, §§ 702 to 705, both inclusive. The Board intrusted orders for audited claims against the county to the Register of Deeds, who was, *ex-officio*, Clerk of the Board, for delivery. If he delivered them to parties the Treasurer would pay them. The Clerk had sent to the Board of Commissioners evidence to show that, in a State case in which a defendant had been convicted, Levi Hargrave had been allowed to prove a ticket

as a witness on behalf of the State, and that the defendant in that case, after conviction, had taken the insolvent debtor's oath, and had been discharged from custody for costs charged against him, thereby making the county liable for half the costs. The ticket was presumptive evidence of the facts appearing from it. *Deaver* v. *Commrs.*, 80 N. C., 116. The Clerk had not made out the charges of Hargrave to the use of Clodfelter, and Kinney, therefore, as lawful agent of the county, could issue an order to the person who was presumed to be the rightful owner of the amount taxed against the county, or the ticket proven by him, and when that order was paid the county was discharged from liability. The Clerk might, and probably ought, to have noted the assignment on his records, and stated in the bill of costs that the ticket was assigned to the use of Clodfelter, if he had sufficient evidence of the transfer, but he failed to do so. The natural consequence of procuring the order from Kinney and collecting it, was to discharge the county, when, but for the falsehood, Kinney would have delivered the order to Clodfelter, and he would have received the money. We think that there was evidence of the intent to defraud Clodfelter, and that the fraud contemplated was in the end a fact accomplished.

If the exception, growing out of the refusal to give the instruction prayed for, can be fairly construed to raise the same question as a motion in arrest of judgement, on the ground that the bill in this form could not be sustained, we find the form given by Wharton, and taken from a precedent approved in another State, and drawn upon a statute substantially the same as ours. Wharton's Precedents of In., No 528. The making of a false representation to one person with intent to defraud another, was expressly held by the Court to be indictable in *State* v. *Dixon, supra.* It has been held by this Court, the Supreme Court of Massachusetts and other States, that when a person makes a false rep-

resentation to an agent, with intent to defraud the principal, a conviction on a bill of indictment embodying such a charge would be sustained. *State* v. *Wilkerson, supra*; *Com.* v. *Hailey*, 7 Metcalf, 462; *Com.* v. *Coll*, 21 Peckering, 514; Wharton's Crim. Law, secs. 2145 and 2146; Bishop on Stat. Crimes, sec. 134.

While no case, heretofore decided by this Court, has presented precisely the point, whether a charge that a defendant obtained something of value from one person by a false representation, made to him with intent to defraud a third person, not connected as agent, we think that the facts bring the case within the meaning of the statute, and clearly within the mischief intended to be remedied by it. It is analogous to the case of *State* v. *Dixon*, *supra*, and clearly comes within the principle stated in that case.

There is no error. The motion for a new trial is refused.

No error. Affirmed.

STATE v. JAMES M. WILKERSON.

Objections to Evidence—False Pretence under the Statute—Caveat Emptor.

1. When a general objection is made, either to the competency of a witness or to the reception of testimony, the party objecting may avail himself of any grounds that may exist in support of his contention, but in the case of testimony, if only part of it is incompetent, the exception will not be entertained if the evidence is severable.

2. The Court below may require the grounds of objection to testimony to be stated. If, after being required by the Court to state his objections, a party refuse so to do, his exceptions shall avail him nothing in this Court.

3. Where the examination of a witness is taken down in writing by a committing Magistrate, and afterwards read in evidence on the trial in the Superior Court, the defendant objecting, and it does not appear from the record and statement of the case on appeal whether the witness signed the examination or not, it will be presumed in this Court that the witness did sign, and that the Magistrate complied with the duties imposed upon him by the statute.

4. Where the prisoner represented that a horse he was about to sell was sound and not lame, and, upon the buyer's remarking that the horse limped, accounted for it as the result of a recent shoeing, and it was shown that the prisoner knew that the horse was diseased: *Held*, that it was proper to refuse to charge that the mere fact that the prosecutor perceived the lameness at the time of the trade entitled the prisoner to a verdict.

5. This case distinguished from *State* v. *Young*, 76 N. C., 260, and the rule as to when the doctrine of *caveat emptor* applies, in indictments for false pretence, pointed out.

This was an INDICTMENT for false pretence, tried before *Philips, J.*, and a jury, at Fall Term, 1888, of STANLY Superior Court.

The pretence charged was, "that a certain bay horse, which he, the said J. M. Wilkerson (the defendant), then and there had, was sound and not lame. Whereas, in truth and in fact, the said bay horse was not sound and was lame from a diseased shoulder." The indictment further charges, that by reason of said pretence, falsely and fraudulently made, the defendant induced the prosecutor, one W. L. Daniels, to exchange horses with him.

There was evidence on the part of the State tending to sustain the charge, and there was evidence on the part of the defendant that the prosecutor tried the horse and saw that it limped lame. There was also evidence to the effect that the prosecutor, after discovering that the horse limped, was assured by the defendant that the animal had never been lame, and that said limping was the result of having been recently shod, was temporary and not the result of disease, and that the horse was as sound as a dollar. There

was evidence to the effect that the lameness was produced by an old disease, the signs of which were not apparent upon inspection. In the course of the trial the State introduced J. W. Bostian, a witness for the State, who testified, "that he was the Justice before whom the preliminary trial was had, and that at the trial before him, one J. P. Talbert was sworn and examined as a witness, and that his evidence was duly recorded by him and returned to the Clerk with the whole record; that J. P. Talbert is now insane and confined in the Morganton Insane Asylum; that the defendant was present, and with counsel, and cross-examined Talbert and the other witnesses; that the evidence so taken down by him at his trial, and returned to the Clerk, is just as it was when he returned it, and was in his handwriting." The State then offered to read to the jury the evidence of J. P. Talbert, taken down by the committing Magistrate. The Court allowed it to be read, and the ground of admission was the facts, "as testified to by J. W. Bostian, the Justice, in addition to the insanity of the witness Talbert, which was admitted." The defendant excepted.

The defendant's counsel asked for the following instructions:

"1. If the horse was lame at the time of the trade, and the prosecuting witness could perceive the lameness, as he testified he did, then the principle of *caveat emptor* applies, and your verdict will be, not guilty." This was refused.

"2. If the jury believe from the evidence that the horse was lame when Wilkerson traded him, and at the time of the trade he told the prosecuting witness that he took the horse at his own risk, then the principle of *caveat emptor* applies, and the jury should return a verdict of not guilty." This instruction was given.

"3. If the jury find from the evidence that Wilkerson believed the horse to be sound and well at the time of the trade, then the jury should find the defendant not guilty." This instruction was given.

The fourth instruction was to the same effect as the above, and was given.

"5. There is no evidence that the condition of the horse, at the time Dr. Ivey had him, was ever brought to the knowledge of Wilkerson." Refused.

"6. There is no evidence that the condition of the horse, at the time Foreman owned him, was ever brought to the knowledge of Wilkerson." Refused.

"7. There is no evidence that Wilkerson knew that the horse ever had a disease of the shoulder." Refused.

"8. If Wilkerson did not know that the horse had a diseased shoulder, then the jury will return a verdict of not guilty." This instruction was given.

The Judge charged the jury that "if the defendant, at the time of the trade, represented that the horse was as sound as a dollar, and all right, that he was not lame and never had been, and that these representations were false, and the defendant knew them to be false, at the time they were made, and the prosecuting witness was thereby deceived, he would be guilty."

The defendant excepted because the Court "refused to give the instructions numbered 1, 5, 6 and 7, as asked for, and to the instructions given by the Court not included in the instructions asked for."

There was a verdict of guilty, and the defendant appealed.

The Attorney General, for the State.
Mr. R. H. Battle, for the defendant.

SHEPHERD, J. (after stating the case). The first exception is addressed to the admission by his Honor of the written examination of Talbert, the objection being that the examination was not signed by the witness. To this the Attorney General answers that the alleged omission should have been assigned in the Court below. It is well settled by our author-

ities that when a general objection is made, either to the competency of a witness or to the reception of testimony, the party objecting may avail himself of any grounds that may exist in support of his contention, but in the case of testimony, "if only a part is incompetent, the exception will not be entertained if they are severable" *Hammond* v. *Schiff*, 100 N. C., 161, 175.

When the objection is made, the Court may, in all cases, require the grounds of objection to be stated, and only those stated can be made the subjects of exception and review. *State* v. *Kemp*, 87 N. C., 538; *State* v. *Secrest*, 80 N. C., 451.

In fairness to the Judges, and in aid of an intelligent ruling upon the questions presented, we go further. and say that if, after being required by the Court, a party refuses to state the grounds of his objections, his exception shall avail him nothing. In this case there was a general exception, but we are unable to perceive any reason why the examination should not have been admitted. The case does not purport to set out anything but a mere *extract* from the examination, and we do not feel at liberty to assume from this that the witness did not sign it. The presumption is that the Justice performed his duty. *State* v. *Parish*. Busb., 239. And his testimony and the remarks of the Judge strongly tend to show that the objection and ruling were based only upon the sufficiency of certain extrinsic facts, necessary to be shown before the examination could be read. If the witness did not sign it, the defendant should have made it so appear by having the entire examination brought up as a part of the case. This he has failed to do, and the exception must be overruled.

The fifth, sixth and seventh prayers for instruction were properly refused, as a perusal of the testimony will show that Foreman sold the horse to Ivey, and after the defendant bought him Foreman called his attention to the diseased shoulder, and that the defendant told him that he had

"gotten the shoulder all right." This disposes also of the exception to the testimony of the said Foreman and Ivey, the objection being that the defendant had no knowledge of the diseased shoulder, while they owned the animal. It was immaterial whether the defendant knew of it then or not, as it was brought to his knowledge before he traded with the prosecutor. Besides, the testimony was admissible to show that the horse was in fact diseased. The other prayers for instruction were given, except the first. This is predicated upon a fact only of the testimony of the prosecutor, and entirely ignores his statement, that when he called the defendant's attention to the "limping" of the animal the defendant assured him that it was not from any disease; had never been lame, and was as "sound as a dollar," at the same time suggesting that the "limping" was caused by the animal having been recently shod.

Mr. Wharton, in his work on Criminal Law, vol. 2, § 2128, says: "We have seen that to cheat at common law, it is essential that the fraud should be latent. It was in fact to meet this difficulty that the statute of false pretences was passed, and under this statute it has been repeatedly held that it matters not how patent the falsity of a pretence may be if it succeeds in defrauding." After speaking of some cases modifying this view, he concludes by saying: "It is submitted, however, that whether the prosecutor had the means of detection at hand, or whether the pretences were of such a character as to impose upon him, are questions of fact, to be left to the jury, as they must necessarily vary with the particular case. If fraudulent and false pretences were used and goods obtained by them, nothing but very gross carelessness will justify an acquittal. The statutes suppose defective caution, for if there were perfect caution no false pretence could take effect." We think that these principles govern this case. It is true that in *State* v. *Young*, 76 N. C., 258, the doctrine of *caveat emptor* was recog-

nized as applicable to false pretence, but, to quote the language of the Court, "the fact misrepresented was that the cotton was 'good middling,' but this was a matter of observation, and the defect was as patent to the prosecutrix as to any one else, and there the doctrine of *caveat emptor* must apply." That case was quite distinct from this. There, in the very nature of things, the prosecutrix could judge of the quality of the cotton, and nothing was said or done by the defendant to deceive or mislead her. It was, at most, a mere matter of judgment, which she, like other purchasers, was expected to exercise. In our case the pretence was that the animal was "sound, and not lame," and the evidence tended to show that the defendant knew that it had a disease of long standing called 'sweeny," which was not perceptible, and that the lameness would not occur until after about three days' driving; that when the prosecutor discovered symptoms of lameness his suspicions were allayed by the assurances of the defendant, as above stated. In view of these circumstances, his Honor very properly refused to charge, that the mere fact that the prosecutor perceived the lameness at the time of the trade, entitled the defendant to a verdict of not guilty. This would be disregarding the testimony tending to the stratagem and fraud of the defendant, and putting the cause to the jury only upon the fact of the testimony which was favorable to him. No proper instruction having been refused, and there being no error in the charge, as given, we see no reason to disturb the verdict.

No error. Affirmed.

THE STATE v. ALEXANDER CAMPBELL.

Larceny of "Due-Bill," under § 1064 *of The Code—Indictment.*

1. While a "due-bill" is not a promissory note, and negotiable by indorsement, it is within the meaning of the words, "or other obligation," in § 1064 of *The Code*. The larceny of such a paper is indictable under that section.

2. But if such "due-bill" had been paid before the alleged felonious taking, an indictment for such taking cannot be sustained under said section; however, it might possibly have been, if the indictment had contained a count charging the larceny of a piece of paper on which the due-bill was written.

INDICTMENT for larceny, tried before *Philips, J.*, at Spring Term, 1889, of the Superior Court of YADKIN.

The defendant is charged with the larceny of "one due-bill of the value of fifty-four cents, of the goods, chattels and moneys," &c. The indictment contains but a single count, and concludes "against the form of the statute in such case made and provided, and against the peace and dignity of the State." The defendant pleaded not guilty.

On the trial, the State produced evidence tending to prove "that the due-bill alleged to have been stolen was given by I. W. Windsor to one Bud Morgan, for fifty-four cents, and afterwards taken up and paid off by said Windsor and laid by him on a counter or shelf in his store, for the purpose of showing his wife how to date a due-bill, from where it was taken by the defendant a few days thereafter."

It was contended for the defendant, that if he "took the due-bill after it had been paid off and taken up" by the prosecutor, and was worthless, that it was not the subject of larceny, and he requested the Court to so instruct the jury. The Court declined to give them such instruction, but told them "that if the defendant took the due-bill with a felo-

nious intent, notwithstanding it had been paid off and taken up, the defendant would be guilty." The defendant excepted. There was a verdict and judgment against him, and he appealed to this Court.

The Attorney General, for the State.
Mr. A. E. Holton, for the defendant.

MERRIMON, J. (after stating the case). The defendant is not indicted for the common law offence of larceny, but for larceny as prescribed by the statute (*The Code*, § 1064), which, among other things, declares that, "if any person shall feloniously steal, take and carry away, or take by robbery, * * * any order, bill of exchange, promissory note, or other obligation, either for the payment of money or for the delivery of specific articles, being the property of any other person, or of any corporation (notwithstanding any of the said particulars may be termed in law a chose in action), such felonious stealing, taking and carrying away, or taking by robbery, shall be felony of the same nature and degree, and in the same manner, as it would have been if the offender had feloniously stolen, or taken by robbery, money, goods or property of any value, and such offender for any such offence shall suffer," &c. The choses in action, thus made the subjects of larceny, are not deemed such subjects at the common law. They are very important instrumentalities, employed constantly in trade and commerce, and are valuable as species of property to the owners of them. They are susceptible of being stolen easily, and such things, as in the absence of protection of them against larceny by the principles of the common law, require to be so protected by criminal enactments. Hence, the statutory provision partly recited above. They are regarded and treated as certain written evidence of valuable and useful orders, promises or obligations to pay money, or for the delivery of specific arti-

cles ; they are valuable and useful as such evidence, and, for the purposes of the statute cited, have no other property or quality of value; however, the paper or other thing on which they may be written might possibly be treated as bits of personal property of trifling value, and, therefore, the subject of larceny at common law. Indeed, in cases similar to the present one, it has been not uncommon, as a measure of caution, to put two or more counts in the indictment, charging in the first one the larceny of a note, bond or other thing mentioned in the statute, and also, in a second one, the larceny of the paper on which they were written. *State* v. *Banks*, Phil., 577 ; Whar. Cr. Law, §§ 349, 350, 1759, 1838 ; *Rex* v. *Vyse*, 1 Moody, 218.

When, however, the indictment charges the larceny of one of the several species of choses in action specified in the statute, and there is no count for larceny at common law, as suggested, the State must prove the larceny of the chose in action as charged, else the prosecution must fail, because the charge is, not for the larceny merely of a piece of paper on which the note or other thing is written, but of the valuable written evidence of the chose in action as charged and as designated in the statute. It is the latter embodied and evidenced by the writing that is charged to have been stolen. It would not comport with just and settled criminal procedure to indict a person for the larceny of a promissory note, and allow him to be convicted upon such charge of stealing a piece of paper. Stealing the latter, if an offence at all, is a common law offence, and essentially different from the statutory offence of stealing a promissory note. The former is not necessarily a part of, or embraced by, the latter. The note might be written on parchment, linen, silk or cotton cloth, or the like. Neither principle nor statutory provision requires promissory notes and like things to be written on paper, though ordinarily, for the greater convenience, they are so written.

The defendant is charged with the larceny of a "due-bill," and he contends that it is not within the terms or meaning of the statute which, by its terms, embraces any order, bill of exchange, bond, promissory note, or other obligation," &c. A "due-bill" is really a simple acknowledgment by the maker thereof of a debt due to the person named in it, without any promise therein to pay the same, and such an acknowledgment is not a promissory note, nor negotiable by indorsement. It might be such note if it contained words of promise. Story on Prom. Notes, § 14, and note; Chit. on Bills, 129, 526 (12 Am. Ed.).

The "due-bill" charged to have been stolen is not specified with as much precision and fullness as it should have been. We must take it to be simply a "due-bill," and, therefore, it does not come within the meaning of the words "any order, bill of exchange, bond, promissory note;" but we think it is embraced by the other words, "or other obligation." The word obligation, in its most technical meaning, implies, *ex vi termini*, a sealed instrument; but it certainly has, also, a very broad and comprehensive legal signification, and embraces all instruments in writing, however informal, whereby one party contracts with another "for the payment of money, or for the delivery of specified articles," whether the same be under seal or not. The words, "or other obligation," are used in a remedial and comprehensive sense, as appears from the purpose of the statute, and the enumeration of the several classes of obligations made the subject of larceny by it—they imply like or similar obligations—some under seal, and others not. A "due-bill" is evidence of an obligation to pay money; the maker, by it, acknowledges the indebtedness, and the law implies and raises the obligation to pay it. Hence, it is the subject of larceny as prescribed by the statute.

The defendant further contended that the evidence in connection with the "due-bill," put in evidence on the trial,

went directly to prove that it had been paid and absolutely discharged; that it was, therefore, without force or value, and not the subject of larceny. There was evidence that it had been so paid, but the Court declined to give the instruction asked for by the defendant, and instructed the jury that "if the defendant took the due-bill with a felonious intent, notwithstanding it had been paid off and taken up, the defendant would be guilty." This is assigned as error.

We think the Court should have given the instruction asked for or the substance of it. The "due-bill," such as we must take that charged in the indictment to have been, was not negotiable by indorsement; the evidence went to prove—indeed, it was not denied—that it had been paid. It had therefore ceased to have force or effect as an obligation, it was no longer an obligation such as contemplated by the statute, it no longer had any value as such, and, therefore, it was not within the purpose of the statute, nor the subject of larceny, as a "due-bill" or an "obligation." It may be that, if the indictment had contained a count for larceny at common law of the paper on which the "due-bill" was written, the defendant might, upon the evidence, have been properly convicted; but it contained no such count, and we do not decide that it could or could not. Whar. Cr. Law, § 1749; Ros. Cr. Law, 624 (4 Am. Ed.); Rex, 7 Phila., 2; Leach's Cr. Com., 673; *Regina* v. *Mumps*, 38 Eng. Com. Law, 148.

This case is very different from a class of cases cited and commented upon by the Attorney General, in which the promissory notes or other instruments charged to have been stolen had been taken up in the course of business, and might be reissued, or put in circulation again, and used from time to time. In all such cases, the promissory note, or other obligation, had not become extinct, and had not lost its value for the purposes contemplated by it.

There is error. The defendant is entitled to a new trial, and we so adjudge.

Error.

New trial.

STATE v. ED. BRACCO.

Indictment—Drummers—Unconstitutional Law.

Our statute (ch. 135, § 25, of the Acts of 1887), making it indictable for a "drummer to sell, or attempt to sell, goods," &c., is in contravention of the Constitution of the United States, and void, in so far as it applies to non-resident drummers and all persons non-resident selling in this State.

INDICTMENT, for selling as a drummer, tried before *Mac-Rae, J.*, at Spring Term, 1887, of the Superior Court of WATAUGA.

The defendant is charged, in the indictment, with having, as a "drummer," from another State, sold, and attempted to sell, to the merchants named therein, in the county specified, in this State, at the instance, and for the benefit of merchants named, in another State, goods, wares and merchandise, by wholesale and by sample, as specified, without having obtained a license so to do from the Treasurer of this State, in violation of the statute (Acts 1887, ch. 135, § 25). He pleaded not guilty, and, on the trial, the jury rendered a special verdict, in substance, and to the effect, that he had sold goods, wares and merchandise as so charged. The Court being of the opinion, upon the facts found, that the defendant was guilty, directed that verdict be entered upon the special verdict, which was done, and, thereupon, judgment was entered against the defendant, and he, having excepted, appealed to this Court.

The Attorney General, for the State.
Mr. G. N. Folk, for the defendant.

MERRIMON, J. The cases cited in the brief of the learned counsel for the defendant abundantly show that the statute

(Acts 1887, ch. 135, § 25), in so far as it applies to non-resident "drummers," and all persons non-resident, selling goods, wares and merchandise by wholesale or by sample, in this State, to persons resident in this State, is not in harmony, but inconsistent with and in contravention of provisions of the Constitution of the United States, and, therefore, inoperative and void. It is sufficient to cite some of the cases decided by the Supreme Court of the United States in point: *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489; *Carson* v. *Maryland*, *ibid.*, 502; *Asher* v. *Texas*, 128 U. S., 129.

There is, therefore, error. The judgment and verdict of guilty must be set aside, and a verdict of not guilty entered upon the special verdict, and judgment given in favor of the defendant.

Error. Judgment for defendant.

STATE v. W. C. TOW.

Practice in Supreme Court—Appeal In Forma Pauperis—The Code, §§ 552, 553, 1235.

1. An affidavit, upon which is founded an order allowing a convicted person to appeal, *in forma pauperis*, under *The Code*, § 1235, is fatally defective if it does not state that the application is in good faith. Such averment is not required in civil cases under *The Code*, §§ 552, 553.

2. If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form; but if they are sent up, and are not in due form, the appeal will be dismissed on motion of the appellee.

STATE *v.* TOW.

This was a MOTION, made in this Court by the Attorney General, to dismiss an appeal *in forma pauperis*, granted by *Clark, J.*, at Fall Term. 1888, of YANCEY Superior Court.

The facts are stated in the opinion.

Attorney General, for the State.

No counsel for the defendant.

SMITH, C. J. The charge against the defendant is for selling spirituous liquors in the county of Yancey, a territory in which a popular vote has been taken and declared to be in favor of prohibition, according to the provisions of chapter 32 of volume 2 of *The Code*.

After conviction and judgment the defendant obtained leave of the Judge, upon his affidavit of inability, to give security or make a money deposit, upon an appeal, to take the appeal *in forma pauperis*, and the transcript of the record has been brought to this Court.

Upon examination, the affidavit, which is sent up, is found to be fatally defective, in failing to state "that *the application is in good faith.*" This is essential to its sufficiency to sustain the appeal in criminal causes, under section 1235 of *The Code*, as determined in *State* v. *Payne*, 93 N. C., 612; *State* v. *Jones*, *ibid.*, 617.

The motion of the Attorney General to dismiss the appeal must be allowed. Had the record simply stated the allowance of the appeal unaccompanied with the affidavit of the defendant and the certificate of counsel, we should have proceeded to hear, assuming that the leave granted was rightful and proper, based upon sufficient grounds, on the maxim, "*Omnia rite presumuntur.*" *State* v. *Jones*, *supra*.

The counsel for the defendant seems, in preparing the paper to enable him to prosecute his appeal without giving security, to have followed the provisions of sections 552 and

553, which relate to appeals in civil cases and do not require the averment of good faith, the omission of which is a fatal defect in the affidavit in criminal cases, not adverting to section 1235.

Appeal dismissed.

STATE v. ELIJAH MCCOURY.

Appeal In Forma Pauperis—The Code, § 1235.

[See head-note to State *v.* Tow, *ante*, p. 350.]

MOTION, by the Attorney General in this Court, to dismiss the appeal.

The defendant was allowed to appeal *in forma pauperis* by an order made by *Clark, J.*, at the Fall Term, 1888, of YANCEY Superior Court.

Attorney General, for the State.

No counsel for the defendant.

SMITH, C. J. The conviction and judgment in this case was upon an indictment for carrying a pistol concealed about the person of the defendant, and leave to appeal was given without security, upon an affidavit in which appears the same fatal defect as that of *State* v. *Tow*. It must be disposed of in the same manner.

Appeal dismissed.

STATE v. WILL. CRAWLEY.

Entry upon Land After Being Forbidden—The Code, § 1120.

1. Upon the trial of an indictment, under *The Code*, § 1120, the defendant can show that he went upon the land in good faith, claiming or having title thereto. But such claim will not protect him unless he establishes title, or satisfies the jury that he made claim in good faith, and had reasonable ground to believe that his claim was well founded. A mere *belief* that he had a valid claim will not do.

2. The above does not apply in cases of indictment for forcible entry or forcible trespass.

INDICTMENT, under *The Code*, § 1120, tried before *Armfield*, *J.*, at Spring Term, 1889, of BURKE Superior Court.

The defendant was arrested upon a criminal warrant, and convicted before a Justice of the Peace of the offence of having unlawfully and wilfully entered upon the land of the prosecutrix, after having been forbidden by her so to do, and without a license, in violation of the statute (*The Code*, § 1120). Thereupon, he appealed to the Superior Court, and there pleaded formally not guilty. There was a verdict of guilty, and judgment thereupon against him, and he having excepted, appealed to this Court.

The Attorney General, for the State.
Mr. T. J. Erwin (by brief), for the defendant

MERRIMON, J. (after stating the facts). On the trial, the evidence produced by the State tended strongly to prove the defendant's guilt. He "claimed to enter under a *bona fide* claim of right and title, and offered to show title to the land in himself, which the Court excluded," and among other

things not necessary to be reported here, it said to the jury, "that even if there was a parol license (which prosecutrix denied), it could be revoked, and defendant could not justify under it, and after being forbidden, if the defendant had entered inside of the field of the prosecutrix, that she had held in actual possession and cultivation for thirteen years or more, and committed the acts testified to, he would be guilty; that if defendant had a *bona fide* claim of title, he was put to his civil action to assert it, and could not justify an attempt to assert it in this way." This is assigned as error.

If this were a prosecution for forcible entry, or forcible trespass on land, in that case the question of force, without regard to the claim of right or title to the land by the defendant, would become material, and it may be that the evidence produced on the trial would warrant a verdict of guilty. But the defendant is charged with a very different offence—that of simply going or entering upon the land of the prosecutrix after she had forbidden him, and without a license from her so to do, in violation of the statute (*The Code*, § 1120) which makes such act a misdemeanor.

Just after the close of the late civil war, it became a common grievance to the owners of land—and it still prevails to some extent—that idle, roving, aimless people, for purposes of mischief, and not infrequently other classes of people for purposes of sport, would go or enter, without force or the display of force, upon their lands, and do mischief, greatly to their annoyance, and sometimes to their substantial injury, leaving them remediless. The purpose of the statute—first enacted in 1866—was to suppress such mischief and grievance. It was no part of its purpose to prevent any person, who has an honest claim or title to land, from going or entering upon and taking possession of it peaceably and quietly, when and if he could do so. It was not intended to apply when force was employed in going upon the land. That case had already been provided against. This Court

has repeatedly and uniformly so, in effect, interpreted the statute's meaning. *State* v. *Crosset*, 81 N. C., 579; *State* v. *Winslow*, 95 N. C., 649, and the cases there cited.

The defendant, therefore, had the right to prove, if he could, that he went upon the land in good faith, claiming to have, or having title thereto, and the Court erred in refusing to allow him to produce evidence for that purpose. But such claim would not avail him, unless he should satisfy the jury, in the absence of title, that he made it in good faith, and he had reasonable ground to believe that his claim was well founded. A mere *belief* on his part that he had such claim would not be sufficient—he was bound to prove that he had reasonable ground for such belief, and the jury should so find under proper instructions from the Court. *State* v. *Bryson*, 81 N. C., 595.

The evidence went to prove that the defendant entered upon and took possession of the land by force. If he did so, then he ought to have been indicted for such forcible entry. *State* v. *Bryan*, decided at this term.

There is error. Let this opinion be certified to the Superior Court according to law.

Error. *Venire de novo.*

STATE v. W. T. MASSEY.

Repeal or Amendment of Criminal Statute—Effect of an Offence Previously Committed—The Code, §§ 965 (6), 3766—*Ch.* 66, *Laws* 1885—*Construction of Conflicting Statutes.*

1. Chapter 66, Laws 1885, amending *The Code*, § 985 (6), being without any saving clause, has the effect of discharging all who had been previously guilty of violations of said section, except those against whom an indictment could be sustained and judgment pronounced under said section without the aid of the words stricken out of it by the act of 1885.
2. *The Code*, § 3766, does not serve the purpose of a saving clause to ch. 66, Laws 1885. That section only applies where an amendatory law repeals a proviso to a section of a former act, or a whole section to a former act, and the section without the proviso, or the section not affected, will support an indictment.
3. It is more dangerous for this Court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished.
4. A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction.
5. When a criminal statute, or any part of it, which is essential to sustain an indictment, is repealed or stricken out by a later act, offences committed under the older statute cannot be punished, unless a contrary intent appear from an express saving clause in the repealing statute, or by necessary implication from its wording.

(MERRIMON, J., and SMITH, C. J., dissented).

This was a CRIMINAL ACTION, tried at the Spring Term, 1889, of the Superior Court of LINCOLN County, before *Clark, J.*

The indictment was found at the Spring Term, 1888. The material portion of the first count of the indictment is as follows:

"The jurors for the State, upon oath, present: That W. T. Massey, late of Lincoln County, before the sixteenth day of February, in the year of our Lord one thousand eight hundred and eighty-five, to-wit, on the first day of April, in the year of our Lord one thousand eight hundred and eighty-four, with force and arms, at and in said county, a mill in the possession of the said W. T. Massey, *unlawfully, maliciously and feloniously* did set fire to, with intent thereby to injure and defraud the Georgia Home Insurance Company, being then and there a body corporate, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State."

There were several additional counts, all charging the burning to have been done at the same time and "unlawfully, maliciously," &c., but "with intent to defraud" some other corporate body. The last count contained a charge of burning a church unlawfully, maliciously, &c., found at the Fall Term, 1888. The defendant is charged in a single count with unlawfully, maliciously, &c., burning a mill, &c., "with intent to defraud the Georgia Home Insurance Company," &c.

The Solicitor admitted the fact, alleged in a plea in abatement, filed by the defendant, that the offence of burning the mill was committed, if at all, on the first day of April, 1884. Thereupon, "the Court, being of opinion that the statute in existence at the time of the offence charged, has been since repealed, and there is now no statute upon which the Court could proceed to judgment on conviction," ordered that the indictment be quashed and the defendant discharged. The Solicitor appealed.

The other material facts are stated in the opinion of the Court.

The Attorney General, for the State.

Messrs. W. A. Hoke and *W. J. Montgomery*, for the defendant.

AVERY, J. (after stating the facts). The indictment is drawn under section 985, subsection 6, of *The Code*, which provides, that "whoever shall unlawfully and maliciously set fire to any church, &c, mill, barn, &c., whether the same or any of them, respectively, shall be in the possession of the offender or of any other person or persons, body politic or corporation, shall be guilty of felony and imprisoned in the penitentiary for not less than five nor more than forty years." The act of 1885 was ratified and took effect on the sixteenth day of February, 1885, and provided that the said section—*The Code*, 985 (6)—shall be amended by striking out "unlawfully and wilfully," when it appears in the section, and inserting in lieu the words "wantonly and wilfully," and by striking out the words "with intent thereby to injure or defraud any person or persons, body politic or corporation." Chapter 66, Laws of 1885.

There are several established rules of construction that will aid us in determining whether the last statute cited leaves the section of *The Code*, under which the indictment was drawn, still in force as to offences falling under its inhibition and committed prior to the sixteenth day of February, 1885.

1. If a later statute is irreconcilably inconsistent in its terms with one previously enacted, it operates to repeal the older statute, so far as such repugnancy extends, by implication, but when any fair construction will reconcile a seeming repugnancy, it must be adopted. *State* v. *Custer*, 65 N. C., 339.

2. When a statute creating a criminal offence is expressly repealed, or any portion of it, that is essential to sustain an indictment drawn under its provisions, is stricken out by a law subsequently enacted, the former will be held inoperative even as to offences committed before the passage of the later act, unless a contrary intent on the part of the lawmakers appear from an express saving clause or by neces-

sary implication from the language in the repealing statute. *Lindsey* v. *State*, Southern Reporter, vol. 5, No. 7, p. 99; *State* v. *Long*, 78 N. C., 571; *State* v. *Wise*, 66 N. C., 120. "The act punished must be criminal when judgment is demanded, and authority to render it must still reside in the Court." *State* v. *Williams*, 97 N. C., 455. When the Legislature re-enacts, in terms or in substance, an act then in force, but declares the law previously passed repealed, it is considered a reaffirmance of the old law. *State* v. *Sutton*, 100 N. C., 474; Bishop on Statutory Crimes, sec. 181. In such cases the legislative intent is implied from the very words of the repealing act. Our case cannot be brought within this principle, for there is nothing in the repealing act to indicate an intent to leave the old law unrepealed or to reaffirm it.

We cannot concur with counsel, that § 3765 of *The Code* should be so construed as to subserve the purpose of a saving clause to the act of 1885. That section is as follows: "When a part of a statute is amended it is not to be considered as having been repealed and re-enacted in the amended form; but *the portions which are not altered* are considered as having been the law since their enactment, and the new provisions as having been enacted at the time of their amendment." If the indictment could be sustained and judgment pronounced under § 985 (6) of *The Code*, after striking out the words "unlawfully and maliciously," wherever they occur in said section, and also the words "with intent to defraud," &c., the defendant might be convicted and punished of this charge. But in order to sustain that view the indictment must be good under that section, without the words stricken out on the sixteenth day of February, 1885. The indictment, however, is plainly framed upon the theory that *The Code*, § 985 (6), was still operative in the year eighteen hundred and eighty-eight as to offences committed before the ratification of the act of 1885.

It is contended, however, that the original section of *The Code* and the act of 1885 are not totally repugnant to each other, but may be construed together, leaving the former in force up to the moment of amendment, and the amended act operative since. It is alway presumed that the Legislature expresses its intention in clear and explicit terms. Potter's Dwarris, p. 219. There is nothing in the amendatory law from which we can even infer the words were to be considered as stricken out as to future offences only. We find there the simple mandate of the law-making department, that the subsection "be amended by striking out," &c. It was so amended on its ratification, when it took effect.

Where an amendatory law repeals a proviso to a section of a former act, or a whole section of a former act, but the section without the proviso or the section not affected will support an indictment, the law referred to (sec. 3766) will apply. But it is enough to show that it has no application in this case. If this Court should attempt to supply the omissions of the Legislature, and resort to strained constructions of criminal statutes in order to prevent the escape of men accused of crimes and assumed to be guilty, it might prove more dangerous to usurp the powers of a co-ordinate branch of the government than to allow some acknowledged criminals to go unpunished.

There is a marked distinction between the case at bar and *State* v. *Putney*, Phil. Law, 543, cited by the Attorney General. The defendant Putney was convicted at Fall Term, 1867, of the Superior Court of Wake County, under an indictment found in December, 1866, of the larceny of a mule. On the 25th of February, 1867, the General Assembly, after reciting "that the crime of stealing horses and mules hath of late, notwithstanding the punishment provided by law, become much more common than formerly," &c., enacted "that every person who shall steal any horse, mare, gelding or mule, and shall be thereof convicted, accord-

ing to due course of law, shall suffer death." Before that time larceny was punishable with whipping, or with fine or imprisonment. The Court held that the old and new law would be construed so as to give effect to both by interpreting "shall," according to its natural import, as referring exclusively to offences hereafter committed, and the preamble certainly indicated that intent. No law, or part of a law, was expressly, or by necessary implication, repealed; and the old and new law were both left operative. Potter's Dwarris, 133.

When, by the Constitution of 1868, corporal punishment was forbidden, the question was raised (in *State* v. *Kent*, 65 N. C., 311), whether one who was convicted of larceny, committed before the law was changed, could be punished by imprisonment in the State prison. The Court held that the law altering the punishment was not an *ex post facto* law, because it did not make punishable an act already committed and not previously criminal, and it did not aggravate the punishment of the crime of larceny, previously punishable with whipping. We think, therefore, the case is easily distinguishable from the cases of *State* v. *Sutton*, *State* v. *Kent*, and *State* v. *Putney*, *supra*, cited by the Attorney General.

In *State* v. *Rogers*, 94 N. C., 860, Mr. Justice MERRIMON, for this Court, says, in effect, that the act of 1885 (ch. 66) repeals the words of *The Code*, § 985 (6), that are mentioned in the act.

We think that the law under which the indictment was drawn did not continue in force in its original form up to the passage of the amendatory act, and we, therefore, concur with the Judge below in his ruling.

It is not the province of this Court to pass upon the innocence or guilt of the accused. If he was not guilty, still he had the right, and it was the duty of his counsel, to have the case disposed of in this summary way. If he was guilty, under § 985 (6) of *The Code*, we must presume that the Legislature, in omitting to add a saving clause to the act of

1885, intended to discharge all who had been previously guilty of violations of the section amended.

The judgment of the Court below is affirmed.

No error. Affirmed.

MERRIMON, J. (dissenting). I dissent from the opinion and judgment of the Court. It seems to me very clear that the statute (acts 1885, ch. 66) is intended to and does operate only prospectively in all respects. It in no way affects, nor was it intended to affect, offences already perpetrated at the time of its enactment; it does not in terms purport to do so, nor is there anything in it, or in it taken in connection with the general statutory provision (*The Code*, sec. 3766) that necessarily gives it such effect. That section provides that "when a part of a statute is amended, it is not to be considered as having been repealed and re-enacted in the *amended form;* but the portions which are not altered are to be considered as having been the law since their enactment, and the *new provisions* as having been enacted at the time of the amendment." That is, the statute stands intact as unamended up to the time of the amendment, and the latter takes effect at the time of its enactment; not having any retroactive effect at all, or any such application, it speaks as amended only for that time.

The statute (*The Code*, § 985, par. 6) makes it indictable to "unlawfully and maliciously set fire to any * * * mill," &c. The amendment thereto — the statute first above cited — makes it indictable to "wantonly and wilfully set fire to any mill," &c. When? Plainly *after* the amendment of the statute. The amendment struck the words 'unlawfully and maliciously" out of it, not as of the time it was enacted or at all in contemplation of law as to offences committed before the amendment, but as, and only as, of the time of its enactment, and substituted the other words, "wantonly and wilfully," these to operate prospectively and not to have

any retroactive effect. The very purpose of these words of the general statutory provision—" and the new provision as having *been enacted at the time* of the amendment "—is to preclude the interpretation that such amendment should have retroactive effect. The purpose was not to repeal the old statute, but to amend and make it a new one, possessing different requisites, from and after the amendment. Otherwise, the words last recited, and, indeed, the whole statutory provision recited, would have no effect—would be useless and nugatory. It expressly declares, that " where a part of a statute is amended, it is not to be *considered* as having been *repealed, re-enacted* in the amended form," but the part unaffected by the amendment continues, " and the *new provisions* as having been enacted *at the* time of the amendment." " It is not to be considered as having been repealed." And why? Because it is to be considered as *intact* as to offences perpetrated before the amendment.

The interpretation I have thus given is strengthened as the correct one, in that it is not to be presumed that the Legislature intended to let crimes, committed in violation of the statute before the amendment, go unpunished, in the absence of any declaration to that effect, nor is such purpose to be allowed to appear by mere inference, especially in the face of the general statutory provision cited. The settled purpose to punish severely the perpetrators of such offences is manifest, and I cannot consent to allow guilty men (not meaning to say that the defendant is, or is not, guilty) to escape by the observance of a mere technicality, which, it seems to me, is clearly excluded, and intentionally, in the way I have indicated.

SMITH, C. J. (dissenting). I concur in the construction put upon sec. 3766 in the dissenting opinion, and its effect upon the amendatory act of 1885, in leaving offences committed before its passage exposed to criminal prosecution. It is

well settled that the repeal of a statute that creates an indictable offence withdraws the offence from the jurisdiction of the Court and the authority of the Court to pronounce judgment. To obviate this seems to be the purpose of the introduction of the terms in which it is declared that, when a part is amended, "it is not to be considered as having been repealed and re-enacted in the amended form," but the new statute, operating thereafter, shall consist of the unchanged part of the old enactment, as in force from the time of its original enactment, and of the amended portions in connection therewith. Such had been the law for a long space previous to 1868 in reference to civil actions. Section 3704, and the qualifying act of that date, embodied in sec. 3766 of *The Code*, seems to have been intended to apply a similar rule to criminal prosecutions. I think the defendant is still liable for his criminal misconduct in violating the provisions of the act of 1885, when it was in force, and that act is not abrogated in respect thereto.

STATE v. WILL. WEDDINGTON.

Removal of Cases to the Criminal Court of Mecklenburg—Const., Art. 4, §§ 2 and 30—The Code, §§ 196, 198, 1353—Comments of Counsel—Evidence—Variance.

1. Under the Constitution, Art. 4, §§ 2 and 30, the Legislature can establish Criminal Courts, and under these sections the Legislature has, by ch. 63, Laws 1885, established a Criminal Court for Mecklenburg County, vested with all the criminal jurisdiction theretofore possessed by the Superior Court of said county.
2. Under ch. 63, Laws 1885, and *The Code*, §§ 196, 198, the Criminal Court of Mecklenburg has jurisdiction to try an indictment for murder removed into that Court from an adjacent county.

3. In the Superior Court of Union it was ordered that this case be removed to the *Criminal* Court of Mecklenburg for trial, and that the Clerk of Union Superior Court certify the record to the *Superior* Court of Mecklenburg, "to the end that it may be there docketed, and *from there* certified to the Criminal Court," &c., for trial. A certified copy of the record was sent to the Superior Court of Mecklenburg, the Clerk docketed it, and then transmitted the same certified copy to the Clerk of the Criminal Court, attaching to it a certificate that it had been forwarded to him from the Clerk of Union: *Held*, that the record being duly certified, it was not material through how many hands it passed in *transitu*, and the Criminal Court had jurisdiction to try the case. So much of the order of removal as required the docketing of the case in the Superior Court of Mecklenburg was surplusage.

4. An indictment for murder charged that the killing was done with a piece of plank, and a witness for the State was allowed to testify (after objection) that he saw deceased wearing a brown wool hat at 4 P. M. before the night of the killing, and on the morning after the killing he found strands of fine brown wool upon a stick which was picked up at the place of the homicide (and with which there was evidence tending to prove the killing was done): *Held*, that the testimony was properly admitted.

5. If an indictment for murder charge that the killing was done with a piece of plank, and the proof is that it was done with a piece of iron, the variance is not necessarily fatal. The rule on this subject laid down in *State* v. *Gould*, 90 N. C., 658, is correct.

6. *The Code*, § 1353, does not forbid a prosecuting attorney to make such comments upon the testimony as would have been legitimate before the passage of the act. That section enlarges the privileges of the prisoner, but does not abridge the rights of the State's officers.

This was an INDICTMENT for murder, found in the Superior Court of UNION County, and moved to the Criminal Court of Mecklenburg County, where it was tried before *Meares, J.*, at December Term, 1888.

The defendant was found guilty of murder, and judgment was entered accordingly.

The material facts are stated in the opinion of the Court.

Attorney General, for the State.
Mr. C. W. Tillett, for the defendant.

AVERY, J. Adopting the order in which the exceptions were discussed by counsel, we will consider, first, whether the Criminal Court of Mecklenburg County had jurisdiction. If that Court had no right to try the prisoner, it would be useless to extend our investigation further than is necessary to reach that conclusion.

The prisoner was indicted with two other defendants, who were found guilty as accessories, and have been sent to the State prison. The following is a copy of the motion and the material portions of the order of removal, made in the Superior Court of Union County, as appears from the record:

"STATE *v.* WILL. WEDDINGTON, JOHN WEDDINGTON and SAM. REID—Murder.

"The defendants in this case, Will. Weddington, John Weddington and Sam. Reid, being charged in the bill of indictment with the murder of one John Pearce, and being brought to the bar of Court, in open Court, in their own proper persons, by J. P. Horn, Sheriff of Union County, and being represented by their counsel, Messrs. T. D. McAuley and J. J. Vann, move, upon affidavit, that the cause be removed from the county of Union to some adjacent county for trial, for reason assigned in an affidavit duly filed by them. And thereupon, upon the motion of the defendants, based upon the said affidavit, it is ordered by the Court, 'that the said cause be *removed from the Superior Court of Union County to the Criminal Court of Mecklenburg County for trial.* And it is further ordered, that the Clerk of this Court certify the record to the Superior Court of Mecklenburg County, to the end that it may be there docketed, and from there certified to the Criminal Court of Mecklenburg County, to the end that it may there be tried.'"

It is admitted that a duly certified copy of the case was forwarded by the Clerk of the Superior Court of Union County to the Solicitor of said Criminal Court, who handed it to the Clerk of the Superior Court of Mecklenburg County. The Clerk of the latter Court entered the case on the docket of the Superior Court of Mecklenburg, and annexed to the said copy of the record a certificate, that it had been forwardrd to him from the Clerk of the Superior Court of Union County, and transmitted it to the Criminal Court. The case was thereupon docketed in said Criminal Court, and, after one continuance, tried there. The motion in arrest of judgment for want of jurisdiction in said Criminal Court is upon the ground that the act creating the Court (ch. 63, Laws of 1885) does not confer upon it jurisdiction of any criminal offence committed outside of Mecklenburg County, even after removal, or, if the said act gives the right to try cases on removal from other counties at all, the jurisdiction of the Criminal Court does not attach till after the cases are certified to the Superior Court of Mecklenburg County, docketed there, and a new transcript of the record sent thence to said Criminal Court. The argument in support of the motion in arrest of judgment is predicated upon the idea that the power of the Criminal Court to try must depend upon the construction given to sections 4, 21 and 24 of the act establishing the Court. We think that the Court below properly refused the motion in arrest of judgment. The right of the General Assembly to establish Criminal Courts is derived from sections 2 and 30, Art. IV of the Constitution. There can be no doubt that, in the exercise of the power given in these sections, the General Assembly has created a Criminal Court, with general jurisdiction of all criminal offences that were cognizable, before the passage of that act, in the Superior Court of Mecklenburg County, and that the latter Court no longer has such general jurisdiction of criminal offences. *The Code* (sec. 196) provides that, "in

all civil and criminal actions in the Superior and Criminal Courts, in which it shall be suggested, on oath or affirmation on behalf of the State or the traverser of a bill of indictment, &c., the Judge shall be authorized to order a copy of the record of said action to be *removed to some adjacent county for trial,*" &c. A subsequent section (198) provides that " when a cause shall be directed to be removed, the Clerk shall *transmit to the Court,* to *which the same is removed,* a transcript of the record of the case," &c. These sections empower the Judges of Superior and Criminal Courts to order the records to be sent to some *adjacent county,* not to any *specified Court,* but the clear implication is, that it would be sent to a Court having general jurisdiction of criminal offences in such adjacent county, and direct the Clerk of the Court, in which the order of removal is made, to send a transcript of the record to the Clerk of the Court to which, by the order, it is to be removed. There being nothing in the act establishing the Criminal Court that is, in our opinion, repugnant to the sections of *The Code* referred to, we hold that it has jurisdiction of this case.

It is admitted, as it also appears from the record, that the transcript was certified in proper form by the Clerk of the Superior Court that tried the prisoner. If duly certified, it was not material through how many or whose hands it passed in *transitu.* The Criminal Court had proper evidence that it was a record, and in that record was an order that could be interpreted and treated only as an order of removal to it for trial. The attached certificate of the Clerk of the Superior Court of Mecklenburg County did not impair or destroy the character of the paper as a record. That depended upon the certificate. The order of removal to the Criminal Court of Mecklenburg gave to that Court the right to try, so soon as the record of the case containing that order should reach its Clerk, duly authenticated, and so much of said order as required the case to be docketed in the Superior Court of Mecklenburg

must be treated as surplusage. The fact that it was so docketed did not affect its authenticity as a record. No such addition to the order, already sufficient, could affect the power of the Criminal Court to try. The sections of the act establishing the Court, cited by counsel as bearing upon the extent of the jurisdiction conferred upon the Court, are not in conflict with the provisions of *The Code*, and our construction of their meaning may be summarized as follows:

1. Section four, in effect, vests in the Criminal Court the right to try any and all criminal offences committed within Mecklenburg County, and which might have been tried in the Superior Court of that county, and for the establishment of the Criminal Court. The word "originating" is evidently used in the sense of "committed."

2. Section twenty-one makes it the duty of the Clerk of the Superior Court of Mecklenburg County to transfer properly certified records of all indictments and all proceedings, by *scire facias*, &c., then pending in said Court, to that established by the act

3. Section twenty-four was evidently drawn without adverting to provisions of *The Code*, and with the view of giving to the new Court the right to try criminal causes not already removed, but which might thereafter be removed from other counties. The language is somewhat ambiguous, but we see no reason why placing "on the docket of Mecklburg and New Hanover counties" should not be construed to refer to the dockets of the Criminal Courts having jurisdiction of criminal offences in those counties, especially when considered in connection with sections 196 and 198 of *The Code*.

The deceased, John Pearce, was a police officer, and, on the night of May 12, 1888, had arrested one McMillan, in the town of Monroe, for a criminal offence, and, while holding McMillan by one arm, received a blow that fractured his

skull (making an aperture of less than a half inch in width) and caused his death. The deceased had pursued McMillan into a room, where a number of negroes were holding a festival, and there arrested him. On coming out of said house with his prisoner, deceased was surrounded by a large and turbulent crowd of negroes, who were making a great deal of noise at the time of the killing. The prisoner was in the crowd, and there was evidence tending to show that the prisoner, as well as a number of other negroes present, had declared, while deceased and McMillan were in the house, that the latter should not be arrested. On the morning next after the killing, "a piece of plank" was found in the immediate vicinity of the spot where deceased was killed, which was about three and one-half feet in length and six inches in width, and exactly three-fourths of an inch in thickness. It was further in evidence that at the very moment when the fatal blow was stricken a piece of iron was heard to fall upon the pavement, and immediately afterwards a piece of iron was found at the place which was some two and a half feet in length and one-half inch in thickness, having a sharp edge. The evidence was that the edges of the fracture on the top of the skull of deceased were sharply defined, as if made with a sharp instrument. The charge in the indictment was, that the killing was done with "a certain piece of plank." There was evidence tending to show that the deceased had been killed by the prisoner with the said plank—that the prisoner had had the piece of plank, or one very similar to it, only a few moments before the killing; but there was other evidence tending to show that he had dropped it about a half minute or a minute before the killing. There was other evidence tending to prove the killing by the prisoner. The theory upon which the defence was conducted was, that the prisoner did not do the killing, and that the fact of killing by prisoner was not proven.

The State then introduced one Gaither, who testified that on the morning after the killing he found the piece of plank in the street, near where the deceased had been struck, and that he walked around, using it for a walking-stick, for more than an hour, when he left it at the house of one Blakeley.

The State then introduced one Ferrill, who was allowed to testify, after objection on the part of the prisoner, that the plank in question came into his possession after it had been left at Blakeley's, and that on the morning of the Coroner's inquest he noticed several strands, like fine brown wool, which had been caught under some small splinters of the plank. The objection was overruled, and the prisoner excepted.

The witness was then asked by the counsel for the State, what sort of a hat the deceased was wearing on the night of the killing; to which question the witness answered that he did not know what sort of a hat he was wearing on the night of the killing, but he did know what kind of a hat he had on at four o'clock of the afternoon immediately previous to the killing. After objection by the prisoner, the witness was allowed to testify further, that at the hour mentioned (4 o'clock of the afternoon before the killing) the deceased was wearing a brown wool hat. The prisoner excepted.

The two first exceptions to the testimony are stated together, because, in fact, one exception might have been made to answer instead of two. The competency of the testimony admitted by the Court cannot be considered and passed upon intelligently, except as raising the question, whether the facts, that witness saw the deceased wearing a brown wool hat at 4 o'clock in the afternoon before the night of the killing, and that, on the morning after the killing, he found upon a stick that had been picked up where the killing was done, and with which there was evidence tending to show the fatal wound was inflicted, were relevant,

and tended to show that the killing was done by the prisoner with the plank. We think that the testimony was properly admitted by the Court. We cannot agree with the counsel for the prisoner, that if the evidence in this case shows that the killing was done with the piece of iron instead of with the plank, there would be a fatal variance. "Where the instrument of death laid in the indictment and that proved are of the same nature and character, and the method of operation is the same, though the instrument is different, there is no variance." *State* v. *Gould*, 90 N. C., 658. "And when the offence was charged to have been committed with a sharp instrument, and the evidence was that the wound was partly torn and partly cut, and was done with an instrument that was not sharp, it was held, that the charge in the indictment was proved, and the degree of sharpness was immaterial." *Rex* v. *Grounsell*, C. & P., 121.

The State introduced, as a witness, the colored man, Moses McMillan, who was in the grasp of the deceased at the time of killing. He testified that he could not see who struck the blow, but that in the excitement following it he escaped, and that a short time afterwards he met the prisoner on the streets of Monroe, and that there was no one present but himself and prisoner, and then and there the prisoner said to witness: "Didn't I tell you I would relieve you from that man? I got the damned son of a bitch."

The prisoner did not offer himself as a witness, nor did he introduce any evidence. One of the counsel for the State, in his argument to the jury, after repeating the testimony of McMillan, said: "Now, gentlemen of the jury, no one has contradicted the testimony of Mose McMillan, and you must accept it as the truth." Defendant's counsel took no exception to the remark at the time, nor was the attention of the Court called to it; but counsel afterwards excepted, on the ground that the remark of the Solicitor was, in effect, a comment on the fact that

the prisoner had not testified in his own behalf, and, therefore, such a gross abuse of privilege and invasion of the rights guaranteed to the prisoner by *The Code*, § 1353, that no presumption shall be created against him by his failure to testify, as to entitle him to a new trial, even though no objection was made to the language at the time. If the witness McMillan had testified to any fact that, by his evidence, appeared to be within the knowledge of others beside the prisoner and himself, it would not have been contended that counsel could not insist, before the jury, that he had not been contradicted, when no evidence had been offered for the prisoner. If such were the effect of the section referred to, the Solicitor, in this case, would not have been at liberty to contend, before the jury, that any one of the witnesses to the facts connected with the killing, or to any occurrence, witnessed also by the prisoner, was entitled to credence, because he had not been contradicted, lest the argument might suggest the idea to the jury that the law allowed the defendant the privilege of testifying and he had not availed himself of it. If no such right had been given to the prisoner, by law, counsel would have been free to comment upon the fact, that this witness was, as to declarations of the prisoner, not contradicted or impeached. When the rules of evidence were changed by the section mentioned in this respect, an important privilege was extended to defendants, guarded by the provision that a failure to exercise it should raise no presumption of guilt against them. But it was not the purpose, in enacting the law, to restrict the officer prosecuting for the State from making a comment upon the testimony that would have been legitimate before the passage of the act, and in which no direct reference was made to the right of the prisoner, or his failure to exercise it. The prisoner's personal privileges are enlarged by the provisions of the law.

The right of the State to conduct the prosecution according to the usual practice, through its officers, so as to aid the jury in arriving at the truth, was not intended to be, and is not abridged in consequence of his refusal to become a witness in his own behalf.

No error. Affirmed.

STATE v. A. N. HINSON.

Slander of Women, under § 1113 *of The Code—Evidence, when Admissible—Ex-parte Testimony.*

1. In an indictment for slandering an innocent woman, under § 1113 of *The Code*, the defendant cannot show, on the plea of not guilty, a prevalent report of sexual intimacy between the prosecutrix and one C., the making of a charge of such intimacy being the defamatory matter specified in the indictment, to disprove its wanton and malicious utterance, though he might make such proof, after verdict of guilty, to the Court, in extenuation, &c.
2. On such trial, it appearing on cross-examination of the prosecutrix that, the morning after the alleged criminal intercourse with C., she had, before hearing the report from her aunt, written to C. and sent the letter to him ten miles away by a messenger, a further question by the defendant, whether her aunt told her from whom she got the report, *Held*, inadmissible, in the absence of a suggestion as to the purpose for which the inquiry was made.
3. Whether a witness is qualified to testify as an expert, is a question for the Court, and not reviewable; and the value of his testimony as such is for the jury to determine. Therefore, when a physician, upon evidence of his study and practice of his profession, was admitted as an expert to testify, as the result of his examination of the sexual organs of a woman, that she had never copulated with a man, an objection to the testimony, based upon the witness' inexperience as to the effect of such intercourse upon the organs of the female, could not be sustained.
4. A woman who has never had actual sexual intercourse with anyone is an *innocent woman*, within the meaning of § 1113 of *The Code*, even though she and a man were surprised in each other's embrace, about to commit the act of copulation, but before it took place.

STATE *v.* HINSON.

INDICTMENT for slander of an *innocent woman*, tried before *Meares, J.*, at October Term, 1888, of the Criminal Court of MECKLENBURG.

The facts appear in the opinion.

The Attorney General, for the State.
Mr. C. W. Tillett, for the defendant.

SMITH, C. J. The defendant is charged in the indictment with the false, wanton and malicious utterance of slanderous words, as therein set out, of and concerning one Emma Harrison, an innocent woman, imputing incontinency and a want of chastity, in violation of the statute (*The Code*, sec. 1113).

The statute declares that if any person shall attempt, in a wanton and malicious manner, to destroy the reputation of an innocent woman, by words, written or spoken, which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor, and fined or imprisoned at the discretion of the Court. Upon his arraignment the defendant entered the plea of not guilty, on the trial of which, before the jury, he was convicted.

There were two exceptions taken during the examination of witnesses to the ruling out of evidence offered, and one to evidence admitted for the State, and errors are assigned in the refusal of the Court to give to the jury certain instructions asked, and to the giving of others in their places. These will be considered in their proper order on the record.

1. The defendant proposed, and was not allowed, to show a prevalent report of sexual intimacy between one Christenberry and the *feme* prosecutrix, the making of which charge is the defamatory matter specified in the indictment, in disproof of their wanton and malicious utterance.

The cases cited in the brief of defendant's counsel and found in our own reports, to-wit, *Nelson* v. *Evans*, 1 Dev., 9,

decided in 1826; *McCurry* v. *McCurry*, 82 N. C., 296, decided in 1880; *Sowers* v. *Sowers*, 87 N. C., 303, decided in 1882; *McDougald* v. *Coward*, 95 N. C., 368, decided in 1886; and *Knott* v. *Burwell*, 96 N. C., 272, decided in 1887, were all civil actions instituted to recover damages, and proof of general reports of the truth of the charge imputed to the defendant was received in mitigation of the damages and in extenuation of the defendant's conduct in repeating what was generally current and perhaps believed, and so would be received such evidence in a criminal prosecution after verdict, by the Court, in ascertaining the punishment merited. But it is not competent to disprove the presence of that malice implied in the utterance of a calumnious and unfounded charge, ruinous to the character of the sex, and unwarranted by any moral duty or as a privileged communication; still less can it be heard to sustain the defamatory words, the truth thereof, and not a general belief in their truth, being necessary to be shown as a defence to the action. *Hampton* v. *Wilson*, 4 Dev., 468.

When a slanderous charge is made, the law, *prima facie*, implies malice from the publication, unless in the case of a privileged communication, which appears when the party is acting under a legal or moral duty towards the person to whom it is made, and in such cases malice must be proved. *Adcock* v. *Marsh*, 8 Ired., 360. No such duty existed here, for, as the testimony shows, the defendant said, at a public place, in the hearing of eight or ten persons, just after the said Emma left, that "his (the defendant's) daughter had caught Andrew Christenberry and Emma Harrison in the act of adultery, and that the strumpet ought to be drummed out of the county." There is, consequently, no excusable element in the occasion on which the words were spoken, imparting a privileged character to their utterance, and current rumor could have no effect in rebutting the implied malice; and its existence, not its degree, was only an inquiry before the jury, in passing upon the issue of guilt.

2. In the course of the cross-examination of the prosecutrix, she stated that the next morning after the alleged criminal intercourse with Christenberry, and before hearing the report, she wrote a letter to Christenberry, and sent it to him ten miles distant by a messenger; that she heard of the report from her aunt. Whereupon, defendant's counsel asked if her aunt told her from whom she got the report. The question, on objection, was disallowed.

We are unable to see the pertinency of the inquiry, or any proper use that could be made of the answer. It was wholly immaterial how or from whom the information came. There is no suggestion of any way in which it could have been made available to the defence, nor of the purpose for which it was sought. This was at least due to the Court, if any complaint is to be made of the refusal to permit the question to be answered.

3. The appellant assigns error in receiving the testimony of a physician who examined the private parts of the prosecutrix, and was allowed to give the results, with the opinion, formed upon the results, that she had never had sexual intercourse with a man. The objection is based upon the witness' previous inexperience as to the effects of such communication upon the sexual organs of the female. The answer to this exception is, that there was evidence from study and practice of his professional knowledge upon the subject of his testimony, and its value is dependent upon the extent of that experience, to be judged by the jury.

In *Flynt* v. *Bodenhamer*, 80 N. C., 205, it is said, and approved in *Branton* v. *O'Briant*, 93 N. C., 99, and repeated in *State* v. *Cole*, 94 N. C., 958, that "the Court must decide whether he has had the necessary experience to enable him to testify as an expert. But the value of his opinion, when admissible, must be determined by the jury alone, and it depends upon the opportunities he has had for acquiring skill and knowledge, and the use he has made of those opportunities."

The Court determines the preliminary fact that the witness is or is not an expert, and when there is any evidence of it, the finding, like that of the jury, is not reviewable in this Court. *State* v. *Davis*, 63 N. C., 578, and other intermediate cases, down to *Smith* v. *Kron*, 96 N. C., 392.

4. The remaining assignment of error is in the refusal to give this asked instruction to the jury: "If the prosecutrix had surrendered her person to Christenberry for the purpose of committing fornication with him, she would not be an *innocent woman*, though the act was not completed, in consequence of the coming upon them of the parties." Instead of so charging, the Court told the jury "that the woman was innocent unless she had had sexual intercourse with a man."

There was testimony tending to show that the parties were surprised, while in the very act of copulation, and prevented from consummating it. As we understand, the parties were in each other's embrace, about to commit the act, and were interrupted, so that it did not take place. It is true, the moral degradation from such a surrender of the person is little, if any, less than would have resulted from actual coition; but it is necessary to draw the line somewhere, the overstepping of which destroys the status of innocency, in the sense of the statute, and short of which it is not lost, and the past adjudication in the construction of the statute drew the line between actual sexual intercourse and any approximation, however near to it It is difficult to define any other. The subject has been recently considered in *State* v. *Brown*, 100 N. C., 519; that we are content, without comment, to refer to.

There is no error, and the judgment is affirmed.

No error. Affirmed.

STATE v. JOHN S. McMAHAN.

Officer; One Acting as Such Presumed to be—Murder.

1. That one acted as a public officer, and was known as such, is *prima facie* evidence of his official character; he is presumed to have been duly qualified, without producing his commission or appointment.
2. The law confers on an officer charged with executing a process all the powers necessary for the purpose, and he is to judge what is necessary.
3. Where an officer had a warrant to arrest a man, and he thought it necessary to disarm the prisoner, and called upon a bystander to assist in disarming him, and thereupon the prisoner drew a pistol and killed such bystander: *Held*, to be a case of murder.

The prisoner was INDICTED for the murder of one Emilis O. Buchanan, in the county of Jackson, and the cause, upon motion of the prisoner, was removed, for trial, to the Superior Court of the county of MACON, and tried before *Boykin, J.*, at Fall Term, 1888, of said Court.

The following is the statement of the case on appeal:

"It was admitted by the prisoner that Buchanan's death resulted from a pistol shot wound, inflicted by him. One Lackey had in his hands two certain warrants, charging certain misdemeanors, and commanding him to arrest and hold the prisoner, McMahan, to answer before a Justice of the Peace for the commission of certain alleged offences. The said Lackey had acted as constable for six or eight years, there being no other constable in that township, and had arrested the prisoner several times on other occasions; the prisoner had never disputed his authority to arrest him and carry him before the Court. Lackey had been regularly elected constable for the time above mentioned. He was duly elected at the election preceding the shooting. Then, he had filed his bond before the Clerk of the Supe-

rior Court, as he testified, and the oath of office was administered by him. Before, at the other times of his supposed induction into office, he had qualified before a Justice of the Peace He had arrested the prisoner about two weeks before the shooting. The prisoner knew that Lackey had acted as constable for a long time.

"At the time of the arrest upon the two warrants above mentioned, the prisoner did not question his authority, but submitted and acknowledged himself a prisoner immediately after said arrest. The said Lackey was informed that the prisoner McMahan was armed with a pistol. He inquired if this was true. Prisoner responded, 'No.' Lackey said that he had been credibly informed that he, the prisoner, did have a pistol concealed in his hip pocket. The prisoner reiterated his denial. Lackey responded that under the circumstances he considered it his duty to search and disarm him, if he was so armed. The prisoner arose from his chair (the parties being at the time on the porch of a certain house), placed his chair between him and Lackey, and proceeded to walk off backwards towards the balustrade of the porch. The said Lackey ordered him to halt, and started in pursuit. The prisoner continued to walk towards the railing. Just as he had placed one leg over the railing and was in the act of raising the other, Lackey seized him and called on the deceased Buchanan to assist him. Buchanan was then standing in the porch. He approached and seized the prisoner by the arm. The prisoner immediately drew his pistol and shot the deceased.

The prisoner requested the Court to charge the jury that Lackey was not a lawful officer and was not authorized to make the arrest of the prisoner, and that the deceased was in no better position than Lackey in respect of seizing and undertaking to disarm the prisoner, and in no view of the case could the prisoner be convicted of murder. The Court declined both requests, and instructed the jury that, if they believed the evidence,

Lackey was an acting officer, authorized to execute the warrants referred to, and that the deceased was required to respond to his demand for assistance, and was entitled to the same protection and immunity with which Lackey was invested; also, that Lackey was authorized to prevent the escape of the prisoner after his arrest; that he was clothed with the power to require the assistance of the deceased: that if prudence dictated it, he had the legal power to disarm the prisoner, without exercise of unnecessary force, and that the officer was constituted the judge of the necessity of disarming the prisoner, and that his action in this respect would be upheld by the law, unless he acted arbitrarily and oppressively. There was a verdict of guilty, judgment, and appeal."

The Attorney General, for the State.

Messrs. K. Elias, Jno. Devereux, Jr., and *W. W. Jones*, for the defendant.

DAVIS, J. (after stating the case). Two exceptions appear in the record.

The first is to the refusal to instruct the jury that Lackey was not a lawful officer, was not authorized to make the arrest, and that the deceased was in no better position than Lackey, and in no event could the prisoner be convicted of murder.

The second, to the refusal to instruct the jury that neither Lackey nor the deceased, under the circumstances, had any authority to disarm the prisoner.

The two exceptions may be considered together. We think it sufficiently appeared that Lackey was an officer, duly qualified; but, whether this be so or not, he was known to be acting as such, and "evidence that a person acted as a public officer, and that he was known as such, is *prima facie* evidence of his official character, without producing his com-

mission or appointment. Such an officer is presumed to have been duly qualified, and this whether in a civil or criminal action." *Tatem* v. *White*, 95 N. C., 453; *State* v. *Speaks*, 94 N. C., 865; *State* v. *McIntyre*, 3 Ired., 171; *State* v. *Curtis*, 1 Haywood, 471.

The law confers upon an officer, charged with the execution of process, all the powers necessary for the effectual execution of such process, and the officer must be the judge as to what is necessary. *State* v. *Stalcup*, 2 Ired., 50; *State* v. *McNinch*, 90 N. C., 695, and cases there cited. Of course he must act in good faith, and cannot, under the pretence of duty and necessity, gratify his malice or exercise wanton and unnecessary severity. *State* v. *Stalcup*, *supra*; *State* v. *Bland*, 97 N. C., 438; *Braddy* v. *Hodges*, 99 N. C., 319. It is the duty of those present, when necessary and called upon, to aid the officer, and the protection extended to the officer extends to persons so aiding. *The Code*, § 1125; *State* v. *James*, 80 N. C., 370. A simple reference to the facts will show that the prisoner should have been disarmed, and it was his ill-fortune, as well as that of the deceased, that he was not disarmed before the fatal shot. There was no error in the ruling of his Honor.

No error. Affirmed.

STATE v. HUMPHREY HOUSTON.

Qualification and Disqualification of Electors under the Constitution, Art. 6, § 1—The Code, §§ 2681, 2684—Perjury.

1. The oath prescribed for electors by *The Code*, § 2681, omits some of the essential requisites to voting contained in the Constitution, and is confined to those indispensable qualifications set out in Article 6, § 1, of the Constitution. The oath does not extend to disqualification incident upon conviction for crime.

2. Under *The Code*, § 2681, the voter swears to his possessing the qualifications of an elector. Under *The Code*, § 2684, he swears that he has not lost the right to vote by any provision of the Constitution or laws which takes that right from him.

3. *Therefore*, where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been *convicted* of larceny in 1884, and the judgment suspended on such conviction: *Held*, that the indictment was properly quashed.

(By SMITH, C. J., concurring: Under the Constitution, Article 6, § 1, a person does not forfeit his rights as an elector by a mere verdict of guilty, or a confession, when indicted for a felony, &c.; but, in order that such forfeiture shall attach, such verdict or confession must be followed by a judgment of the Court against the accused. Where one is convicted of a felony, but the judgment is suspended, he does not forfeit his rights as an elector. *Therefore*, the indictment in this case should have been quashed, because it appeared on its face that the judgment was suspended on the "conviction" charged in the bill.)

CRIMINAL ACTION, tried before *Merrimon, J.*, at December Term, 1888, of BUNCOMBE Superior Court.

The defendant is charged in the indictment with the crime of perjury, in swearing, before a Registrar, when making application to be registered as a voter, preparatory to the exercise of the electoral franchise, that he was "a duly qualified voter," when in fact he was not so duly qualified

and entitled to be registered, he having been theretofore (to-wit, in July, 1884) convicted of larceny by the verdict of a jury, upon which judgment had been suspended.

Upon the trial his counsel entered a motion to quash the indictment, which was allowed by the Court, upon the ground of its insufficiency in form to warrant a conviction and sentence, from which ruling the Solicitor on behalf of the State appealed.

The Attorney General, for the State.
No counsel for the defendant.

DAVIS, J. The oath administered is contained in section 2681 of *The Code*, and is in these words: "I, _____, do solemnly swear that I will support the Constitution of the United States, and the Constitution of the State of North Carolina; that I have been a resident of the State of North Carolina for twelve months, and of the county of _____ for ninety days; that I am a duly qualified elector, and that I have not registered for this election in any other precinct, and that I am an actual and *bona fide* resident of _____ township. So help me, God."

The inquiry that presents itself, is as to the meaning and force of the words "a duly qualified voter," contained in said oath, in the taking of which the perjury is alleged to have been committed, and whether, in their connection, they embrace more than the original conditions on which depend the right to be admitted to the registry as a competent voter. There is an omission, in the form of the oath, of some of the essential requisites prescribed in the Constitution, such as naturalization of one alien born, which the term may supply; and thus the oath is confined, as suggested, to those indispensable qualifications set out in the Constitution, Art. VI, sec. 1, and does not extend to the loss of the franchise consequent upon the commission of and convic-

tion for crime. This construction is supported by the form of the oath directed to be taken, under section 2684, where a registered voter is challenged. It is made the duty of the judges to explain, to the person offering to vote, the required qualifications, and to ascertain by examination if he possesses them, and then to administer the oath therein set out, in which, among other specific prerequisites, are the words, "that you are not *disqualified from voting* by the *Constitution and laws of this State.*" In the former, the voter swears to his possessing the qualifications of an elector; in the latter, that he has not lost the right, by any provision in the Constitution and under the laws which takes it from him. The last oath points distinctly, as the first does not, to the disqualification which may arise under the Constitution. We are, therefore, of the opinion, that the oath administered to the defendant did not embrace the alleged grounds of disqualification, and that for this reason there was no error in the ruling of his Honor, in quashing the indictment.

No error. Affirmed.

SMITH, C. J. (concurring). Concurring in the opinion of the Court, that no false oath has been taken in this case, upon the allegations contained in the indictment, I think (and in this my convictions are strong) the ruling may be sustained on the ground, as I understand the record, upon which it was predicated in the Court below, and this is, that a judgment upon conviction is essential to the deprivation of the electoral franchise.

The section of the Constitution in question, after enumerating the required qualifications for a voter, proceeds to say: "But no person who, upon conviction or confession in open Court, *shall be adjudged guilty* of felony, or other crime infamous by the laws of this State, and hereafter committed, shall be deemed an elector, unless such person shall be

restored to the rights of citizenship in a manner prescribed by law."

Now, upon a fair and reasonable interpretation of this highly penal clause, which, besides the punishment inflicted for the crime, affixes the personal disability, can it be extended to a mere verdict establishing guilt, or do these consequences follow the rendition of the judgment, and *result from it?* The able and efficient Attorney General contends, that the conviction alone and of itself is sufficient, without further action in the cause, to annex to the person of the elector the specified disqualifications, and withdraws from him, at once, the right, as a voter, to participate in any election thereafter held for the choice of public officers, or for any other purpose affecting the interests of the public. In support of this view are cited and relied on the cases of *Commonwealth* v. *Lockwood*, 109 Mass., 325, and *State* v. *Alexander*, 76 N. C., 231.

The cases have one feature in common, and refer to the exercise of executive clemency towards the convicted criminal, *in misericordia*. The case from Massachusetts puts a meaning upon the word "conviction" that confines it to the action of the jury alone. Yet, when the results are to reach beyond the punishment proper prescribed for the offence, and work *a change in the political status of the offender*—a deprivation of personal rights - the opinion pauses, and the eminent Judge (GRAY), who delivers it, uses this qualifying language: "When, indeed, the word 'conviction' is used to *describe the effect of the guilt of the accused, as judicially proved* in one case when pleaded, or given in evidence in another, it is sometimes in a *more comprehensive sense, including the judgment of the Court* upon the verdict or confession of guilt; as, for instance, in speaking of the plea, *autre fois convict*, or of the effect of *guilt judicially ascertained as a disqualification for office.*" He proceeds to give this meaning to the word, where, in the Constitution, it is provided that no person con-

victed of bribery or corruption in obtaining an election or appointment "shall hold a seat in the Legislature, or any office of trust or importance in the State government."

I see no just reason for distinguishing in principle the consequences flowing from the criminal act, in the conditions under which, and the proof by which, they are to be extended to the disability to give evidence and the disability to vote. In my opinion, the same rule must govern in each.

The doctrine is that the party, in case of incompetency to testify (in the language of Mr. Greenleaf), "must have been legally *adjudged guilty* of the crime," (the very words used in the Constitution) "and this is not done in rendering the verdict, for it is the *judgment, and that only*, which is received as the legal and conclusive evidence of the party's guilt for the purpose of rendering him incompetent to testify." 1 Greenl. Evi., secs. 374 and 375.

In the words of Lord MANSFIELD, spoken in *Lee* v. *Gansel*, 1 Cowper, 3, "a conviction upon a charge of perjury is *not sufficient unless followed by a judgment.* I know of no case in which a conviction alone has been an objection, because, upon a motion in arrest of judgment, it may be quashed."

The cases are numerous to the same effect, as well as the concurring authors in works upon the law of evidence. *Rex* v. *Cosby*, 2 Satk., 658; 2 Inst., 419; Strange, 1198; 1 Stark Evi., 95.

Under the statute of New York which forfeits the dower of the widow who has been *convicted* of adultery in a divorce proceeding, it is held that there *must be a judgment* to render the bar effectual. *Scheffer* v. *Pruden*, 64 N. Y., 47; *Petts* v. *Petts*, 52 N. Y., 593.

In *Gallagher* v. *State*, 10 Texas App. Ct., 469, decided in 1881, the indictment was for illegal voting, prosecuted against one who had been found guilty of burglary and sentenced *in the verdict* to confinement in the penitentiary; and an

exception was taken, on a motion to quash, to the want of an averment *that judgment had been entered.*

The Court refused the motion, saying that "the word 'convicted,' used by the pleader, has a definite signification in law. It means that a *judgment* of *final condemnation* has been pronounced against the accused."

In *State* v. *Jones*, 82 N. C., 685, ASHE, J., speaking for the Court, and discussing the question whether the constitutional political incapacity should, in a case where this results, be made a part of the judgment of the Court, says: "This should not be the judgment. The Courts have no such power. They can only render such judgment as the law annexes to the crime and empowers them to pronounce. For the crime of larceny the law has prescribed the punishment, which the Courts, by their judgment, may impose, to be imprisonment in lieu of corporal punishment. This is the only judgment they can pronounce, the only punishment they can impose. In rendering their judgments, they cannot look to consequences. They have nothing to do with the *disqualifications and penalties which, under the Constitution, may result from them.*" This language conveys a very distinct intimation that the disabilities are consequent upon, though no part of, the judgment itself.

In *State* v. *Alexander*, the Chief Justice (PEARSON) dissented in an opinion which has been sustained by the Supreme Court of Illinois, in *Flaunce* v. *The People*, 51 Ill., 311, in construing a section of the criminal code of that State, which declares that "each and any person convicted" of any of the crimes previously mentioned, and of which larceny is one, shall be deemed infamous in a sense that he has been *convicted by the jury*, but not until the *judgment is rendered is he convicted by the law.*" The Court says: "An examination of the adjudged cases in the various States of the Union, where substantially the same laws are in force, will show that it is not the commission of the crime, nor the verdict of guilty,

nor the punishment, nor the infamous nature of the punishment, but the final judgment of the Court that renders the culprit incompetent."

But without going outside the limits of the State, I find an adjudication in *State* v. *Valentine*, 7 Ired., 225, directly in point. In this case an accomplice in the murder, with which the prisoner was charged, had been convicted but not sentenced, and was examined as a witness against him, after objection (or rather his deposition, taken immediately between verdict and judgment, was used in evidence), and he was found guilty. NASH, J., afterwards Chief Justice, in disposing of the exception to the receiving the deposition in evidence, thus speaks: "His guilt, to reach that result, must be legally ascertained by a conviction, and that *followed by a judgment.* * * * This can only be done by the record, and that must show both a *conviction and judgment;* otherwise it is incomplete—not a full record of the case. The judgment may have been arrested and the conviction thereby rendered a nullity, as if it never had an existence."

To authorize the loss of personal privileges as a witness or voter, there must be administered the appropriate punishment due to crime imputed and ascertained by a jury finding, or confessed, and the cause must come to an end by a final judgment disposing of it. Such must be understood to be the meaning of the term "conviction," upon which is dependent the incurring of such disabilities. Until this is done, and the cause fully disposed of, there has been no condemnation of the law, nor follow those further penal consequences to the personal status of the criminal; and this from that benignant rule, adopted in the construction of penal statutes of doubtful import, which interprets them favorably towards the accused. The language of the Constitution itself enforces the rule of construction in the present case, since, not stopping at the words "conviction or confession in open court," it proceeds, and requires the person

to be also "adjudged guilty," and this plainly implies the concurring action of the Judge to give it full legal effect.

In the indictment it is alleged that the judgment consequent upon the verdict has been suspended—that is, put off, to be hereafter pronounced, if deemed proper, when, if ever, moved hereafter, it is exposed to an order of arrest, founded upon any substantial defect in the indictment itself, and if arrested, the force of the verdict is destroyed, and, in legal contemplation, there has been no conviction of crime, and can be no punishment inflicted to which the disability can attach.

Moreover, while the prosecution remains in an unfinished state, no appeal is admissible to correct any errors in law that may have been committed on the trial, and which would render it invalid.

There is another anomalous feature developed, if the rendition of the verdict suffices to produce this personal infirmity in the elector. The Judge deems the conduct of the accused such, or for some other consideration, as not to require the present vindication of the violated law, and forbears to proceed; and yet the severe and heavier punishment of disfranchisement cannot be arrested while the verdict remains, neither by the Court nor through intervening executive clemency.

If sufficient grounds were found for staying the hands of justice, as must be inferred from forbearing to render judgment, must it have been intended that the heavier blow should fall upon the offender, in the loss of citizenship, recoverable only in an action to be provided by legislation? In either aspect of the case, I concur in the ruling of the Court, that the indictment be quashed.

STATE v. GILES.

Bastardy Proceedings—Former Judgment—Constitution—Assent, when presumed Apt Time.

1. The affidavit in a bastardy proceeding may be amended in the Superior Court, with the permission of the Judge, and there is nothing in the point that such amendments cannot be made, after the defects are pointed out by a motion to dismiss.
2. A former proceeding in bastardy, which was dismissed for want of jurisdiction, is no bar to a second proceeding based upon the same charge.
3. The fact of illicit intercourse with others, even when approaching a habit, does not, in the absence of other evidence tending to prove the falsehood of the charge, rebut the presumption given by the statute to the examination of the woman in bastardy proceedings. But it is otherwise, if habitual intercourse with another man, about the time the child must have been begotten, is proven.
4. Where, by statute, the Superior Court is authorized to try any case by *consent* at a term devoted exclusively to criminal actions, and a bastardy proceeding is regularly tried, the defendant making no objection until after verdict: *Held*, that in law the defendant is deemed to have assented to the trial, and his objection was not in apt time.
5. The statute regulating the judgment in bastardy proceedings, by which a fine of ten dollars and the payment of fifty dollars for the support of the child are imposed upon the defendant, and he is imprisoned until he makes payment, is constitutional, as the defendant can be relieved of the imprisonment under the insolvent debtor's law (*The Code*, § 2067).

BASTARDY PROCEEDING, tried before *Merrimon, J.*, at January (*criminal*) Term, 1889, of CUMBERLAND Superior Court.

The defendant appealed. The facts are stated in the opinion.

The Attorney General, for the State.

Mr. F. J. Jones, for the defendant.

SMITH, C. J. The defendant being accused, upon the oath of Mary J. Warren, made before a Justice of the Peace of Cumberland County, of being the father of a bastard child born of her body, upon a warrant issued by such Justice, was arrested and brought before him for the purpose of inquiring into the truth of the charge. Upon the trial of the issue of paternity, it was found against him, and from the judgment the defendant appealed to the Superior Court.

At the trial of the issue at March Term, 1889, of the Superior Court of Cumberland, the jury returned a similar verdict, and thereupon it was adjudged, "that the defendant pay a fine of ten dollars; that he pay all the costs of this case, and that he pay also into Court, for the benefit of Mary J. Warren, the sum of fifty dollars, thirty dollars of which is to be paid in cash and the balance in installments of ten dollars cash each year hereafter, until the full amount be paid; and that he give bond in the sum of two hundred dollars, with sufficient sureties, to indemnify the county of Cumberland against the maintenance of the child, and he is ordered into the custody of the Sheriff until this order is complied with." From this judgment the defendant appeals, assigning the various errors set out in the transcript of the case on appeal.

When the cause was called for trial the defendant moved to quash the proceedings upon several grounds:

1. For a variance in the name of the mother as she is designated in the affidavit and the warrant, in the first being called Mary K. Warren, and in the latter Mary Jane Warren.

2. For that the affidavit fails to allege that it is made voluntarily, or that affiant is a single woman; and

3. For that it also omits to aver that the child is likely to become a county charge, or upon what particular county it may become a charge.

Thereupon, leave was given to amend in these particu-

lars, which being made, the motion to quash was denied, and the defendant excepted to the rulings, both in refusing the motion and allowing the amendments.

The affidavit and warrant to which the objections apply are not found in the record, and we must therefore accept the statement of what they contain as set out in the specifications of the appellant as correct, and we must also assume that the amendment allowed in the affidavit was with assent of the affiant and truthful in fact, so that the only question is as to the power of the Court to permit amendments that remove the grounds of the appellant's objections.

Without considering the consequences of a variation in the middle name, or the letter as an initial representing it, when the rightful christian and surname are given, in the absence of any evidence, or suggestion even, that both names do not designate one and the same person, or that either is borne by any one else, the defect, if any, is remedied by the permitted correction. The possession of the power of the Court to correct such inadvertences, and to allow much more serious amendments, and even at a later stage in the case, is so well understood and settled in this State in civil actions, as not to require from us the production of decided cases. They will be found in Seymour's Digest, under title Amendment, to which we will only add *State* v. *Smith*, decided at the present term.

There is no force in the argument, that an amendment that removes objections, valid in the form of the affidavit, as then existing, must be made before they are taken, and cannot be made afterwards, since it is precisely for such a purpose the power is conferred, to be exercised in furthering the ends of justice, at the discretion of the Judge, in order that such as are trivial, and do not affect the substantial and understood matters in controversy, may be removed. *The Code*, §§ 269, 270.

The defendant produced the record of a previous proceeding, instituted against him upon the same charge, and dismissed when carried to the Superior Court, as a bar to this.

We have but a fragment of this case, and it is confined to what transpired in the cause after it reached the Superior Court, none other being sent up. It is very imperfect and inconsistent in itself even, for it appears therefrom that a jury, whose names are mentioned, was impaneled, "to try the issues of traverse, joined between the State and the defendant," and the verdict rendered is that, "the defendant is guilty, as charged in the bill of indictment." Then follows this entry: "Motion to quash for want of jurisdiction. Motion allowed." The explanation furnished in the case transmitted to this Court is, that the issue was as to the paternity of the child, and that at the trial it was shown that the said Mary Jane was born and had resided in Sampson County until her child was two months old, when she removed to Cumberland, and within twelve months thereafter made an affidavit charging the defendant with being its father, upon which that proceeding was based.

Upon the ground, as we understand, that the mother, not having resided in Cumberland for a year, had not acquired a settlement therein, so that the child had not become a county charge, the jurisdiction did not then reside in the county. *The Code*, § 3544. The year had, however, expired before the present proceeding was initiated, and the former interposes no obstacle to the exercise of the jurisdiction that now does attach to try the cause upon its merits.

In the course of the trial, to which the defendant assented, after his motion was overruled, the defendant proposed to put to the witness W. M. Warren, then undergoing examination, the following interrogatory: "Were you with Mary J. Warren in a certain field, where one B. A. Strickland was to meet her for illicit intercourse, upon a prior engagement, and you, being there, prevented her from carrying out the engagement?"

Upon objection from the State the question was disallowed, and the defendant excepted, at the time stating that the evidence was sought to impeach her character as a witness.

A question in relation to an attempted intercourse between the same parties on another occasion was proposed, and in like manner ruled out.

The answer to these exceptions is found in the fact that illicit intercourse with others, and even when approaching a habit, does not, unconnected with other evidence tending to show the falsehood of the charge, of which none appears, rebut the presumption given by the statute to the examination of the woman, and hence the defendant has not been made to suffer harm from the rejection of the evidence. This is decided in *State* v. *Bennett*, 75 N. C., 305, and in *State* v. *Parish*, 83 N. C., 613.

It would have been otherwise if the proof had been of habitual intercourse with another man about the time when, in the course of nature, the child must have been begotten, as held in *State* v. *Britt*, 78 N. C., 439.

So, too, as the *effect is given* to the examination without discrimination as to the misconduct or reputation of the woman making it (for, indeed, the very cause discloses the want of virtue), neither would these repel the statutory presumption, alone and unaided, and there was no error in refusing the evidence offered for the purpose stated.

The defendant further objects to the assumption and exercise of jurisdiction at the term of the trial, because, by law, it is devoted to criminal actions only, and moved to set aside the verdict for this cause. This objection comes too late after trial, as it involves acquiescence and consent.

The act distributing the Superior Courts among the districts, after the increase in their number to twelve (Acts 1885, ch. 180), provides for the holding of four terms of the courts in the county of Cumberland for the trial of criminal cases,

and two terms of two weeks each for the trial of civil cases alone, designating the time of each.

But an amendment was made by the act of January, 1887, ch. 37, to the clause appointing the terms for this county, by superadding thereto as follows: "That any and all civil process may be made returnable to any term of the Courts for Cumberland, and after the criminal business is disposed of at any term set apart for the trial of criminal cases, the Court shall proceed to hear and determine all civil cases which do not require the aid of a jury, *and may try, by consent of parties, any jury cause at said criminal terms.*" When a motion is not opposed, which should be if any objection exists to its being granted, it is deemed to be assented to, as held in *Atkinson* v. *Whitehead*, 77 N. C., 418, and subsequent cases following it. Much more does the voluntary entering upon the trial before the jury give, if not express and direct, an implied assent to the jurisdiction assumed and exercised.

The remaining exception is to the judgment itself as inconsistent with the Constitution, though following the statute, in that it imposes upon the defendant the payment of fifty dollars for the use of the woman, and a fine of ten dollars besides, and imprisons for an indefinite period in case of default in making payment. The fine is *quosi* penal, but the payment of the residue is not, and the proceeding is not in the exercise of a criminal, but of a civil, jurisdiction in providing for the present support of the child, and an indemnity to the county in case of its becoming a further public charge. The commitment is in the usual form to secure obedience to its order, not, as the objection has it, "for confinement" in the house of correction for the term of twelve months, as might have been done under sec. 38 of *The Code*.

The error in the contention consists in regarding the requirement of the payment of these amounts, and an enforcement by imprisonment, as an award of punishment

for a criminal offence, which in no sense they are, unless the ten dollars fine may be so considered. It is but the exercise of a power to compel obedience to the order of the Court, and an imprisonment from which the party may be relieved under the insolvent law, as if committed for fine and costs in a criminal prosecution. *The Code*, sec. 2067; *State* v. *Davis*, 82 N. C., 610; *State* v. *Bryan*, 83 N. C., 611. There is no error, and the judgment is affirmed.

No error. Affirmed.

STATE v. WILLIAM JACOBS.

Disturbing a Religious Congregation.

There were two parties of religious worshipers, each claiming the same church building, and each of whom posted up notices forbidding the other to enter upon the premises. On a certain Sabbath the defendant and his associates took possession, and when the leader of the other party and his associates came up, the defendant, and others aiding him, forbade and prevented their entering the church or worshiping therein. Out of this controversy sprung an indictment of the defendant for disturbing a religious congregation: *Held*, that it was error to exclude evidence, offered on the part of defendant, to show the *bona fides* of his conduct in taking possession of the church.

CRIMINAL ACTION, tried before *Philips*, *J.*, at May Term, 1888, of ROBESON Superior Court.

The indictment against the defendant, found at January Term of Robeson Superior Court, charges that the defendant, "being a person regardless of the solemnities of the public worship of God," * * * did, in said county, "wilfully interrupt and disturb a certain assembly of people, there

met for the worship of God, at a certain church, known as New Hope Church, in the county aforesaid, by then and there forbidding the said congregation to enter the house of worship, or hold a meeting therein, by then and there preventing the said congregation from entering into the said house of worship, to the great injury," &c.

Upon this arraignment the defendant entered a motion to quash the indictment, for that the facts set out do not constitute an indictable offence, the determination of which the Judge reserved, until the evidence was heard, and afterwards denied.

The defendant then put in his plea of not guilty, upon the trial of which he was convicted by the jury, and from the judgment thereon appealed.

The other essential facts are stated in the opinion.

The Attorney General and *Mr. E. C. Smith*, for the State.

No counsel for the defendant.

SMITH, C. J. The principal witness examined for the State, Calvin Lowry, testified substantially as follows: On the first Sabbath of the past year, a stated time for holding religious services in the church known as New Hope Church, he, with a wagon in which were his family of ten or twelve persons, came to the house for religious worship, and found it surrounded with a rail fence three or four rails high, and found the defendant there, who had constructed a small room of about four feet square in one of the corners of the house.

That on halting, defendant ordered the driver of the wagon to keep on, but by witness' direction he halted, and witness got out and started to the house, when he was met by the defendant and forbidden by him to enter, and was prevented from entering and prevented from having the religious services.

That there were present at this time from fifty to a hundred persons, who had come to attend, and were compelled to hold their meeting a short distance off in the open air, at which, after singing and praying, and giving out future appointments, the meeting was closed, and those in attendance dispersed.

That the place had been used for public worship for seventy-five or one hundred years, two houses built for the purpose had rotted down, one had been burned, and the present one put up in its place.

That there were others with the defendant who were in the small corner room, which he said was his residence, and was at the open and unclosed part of the house.

That defendant had posted notices forbidding any one to enter the church, as had been done by the other opposing claimants, forbidding those of defendant's party to enter.

This testimony was in its material facts corroborated by other witnesses for the State, who were examined in reply to defendant's testimony.

The defendant, examined on his own behalf, testified in substance: That he had forbidden the said Calvin Lowry to go upon the premises, telling him the land belonged to witness, and he so believed.

He was then asked by his own counsel to state why he did this, the purpose of the inquiry being to ascertain if the disturbance was wanton, wilful and contemptuous. The question was disallowed, the proposed evidence ruled inadmissible on the Solicitor's objection, and the defendant excepted.

Resuming, the witness said he told Calvin that there had been confusion enough, and witness wanted him to go on and let us alone, as he was disturbing our congregation; five or six persons standing around heard it.

That Calvin then went away, took a chair out of his wagon, sat down and began to sing, while witness and those with him went to the school-house and there had their meeting.

That at the time of the conversation in which Calvin was forbidden to enter, none but himself and family had come—not more than a dozen had arrived, but the Sunday-school scholars came afterward, and thus increased the number, and witness was in possession, nor had witness words with any one else except Calvin.

That witness had himself been preachin g in the house, and there was no more disturbance than such as resulted from his prohibiting, and thereby preventing, the use of the church that day by him and his party.

That witness and his set held meetings in the school-house, and he used the small inclosure in the church as a place for prayer, when it was convenient, three or four times a week.

In this testimony, of which the above is a summary, and relates to what occurred, the defendant is sustained by another witness, and it suffices to show what facts transpired to support the charge of disturbance of a religious meeting, and to warrant the verdict.

Waiving the question of the sufficiency of the indictment in alleging a criminal intent, and of the evidence offered in its support, about which, as unnecessary, we abstain from expressing an opinion, we think there is error in excluding the testimony offered to show the *bona fides* of the action of the defendant, in asserting his supposed right of property in taking possession of the premises and excluding those who had come to worship.

The gist of the offence charged is the disturbance of a religious congregation, in refusing to let them enter and engage in religious services, as it was accustomed to do, within the church building. There was no interruption in the service held a short distance off under the tree, nor before, further than that produced by the demand and the attempt to enter, not attended with violence, and the defendant's refusal to allow it.

This refusal is the criminal act imputed to the defendant and proved by the witness, and none other, by which the intended religious services in the house were frustrated, and partially were conducted elsewhere.

The conduct of the defendant was lawful, if he had a title to the premises; and if he had not, but *bona fide* believed he had such right to the premises, and acted under that belief, however inopportune the time and manner of asserting it, he did not incur liability to a public prosecution, even though many persons had come to worship there, and were not allowed to do so. To amount to a misdemeanor, the disturbance of the contemplated religious exercises must not only be actual and voluntary, but *wanton*, proceeding from a reckless disregard of the time and place, and an indifference to the rights of others, as interpreted in *State* v. *Ramsay*, 78 N. C., 448, where the subject is discussed.

The ruling in this case has been invoked in support of the present prosecution, as establishing the proposition that the prevention of persons arrived at a place of public worship, and about to assemble for that purpose, when prevented from doing so by another, are *disturbed* and the criminal act committed. But the case does not go thus far There the congregation had formed within the church, and were awaiting the beginning of the regular service by the minister, who was present in the pulpit, and, according to some of the witnesses, a voluntary singing, a prelude thereto, was going on. The defendant, who had been expelled, began to speak about the matter of his expulsion, when he was told he could not proceed, and defiantly did proceed until put out of the house; and, re-entering, resumed his speaking, in disregard of repeated commands and remonstrances from the minister, and by his noise and disorderly conduct broke up the meeting, and the members present left and went home.

This was declared to be the misdemeanor charged. Besides the actual disturbance of a *religious congregation*, not a *con-*

gregation of religious persons engaged in transacting secular business of the denomination, held not to be an indictable offence in *State* v. *Fisher*, 3 Ired., 111, there must be in association with the act a criminal intent—that is, an intent to do, knowing the consequences, those acts which necessarily tend to disturb and do disturb such religious congregations in their worship, or to break it up and prevent the proposed religious services. If the intent does not co-exist with the fact of disturbance, but is the sole result of an honest claim of property and of a right to possess and hold it, no ground is afforded for a criminal prosecution, unless it is asserted and maintained in a violent and disorderly manner, and in excess of the just and firm maintenance of the asserted claim. The Court below put a different view, and refused to hear any evidence explanatory of defendant's conduct and showing his good faith, sustaining the exceptions of the State on the grounds "that the acts must speak for themselves, and the defendant cannot be heard to say what was meant by his conduct." It is very true that the defendant could not be permitted to vary the nature or dispute the obvious and necessary results of what he did, as ruled in *State* v. *King*, 86 N. C., 603; *State* v. *Voight*, 90 N. C., 741; *Moore* v. *Cameron*, 93 N. C., 51, and which follows and sustains *Cheatham* v. *Hawkins*, 80 N. C., at page 161; but it is otherwise, where the act alleged to be criminal is done in the exercise of a supposed right, not extending beyond reasonable limits, and becomes a misdemeanor only when associated with a wanton intent, as has been already defined. The interruption charged consists, not in tumultuous conduct or violence or menace of violence, in manner or word, but simply in withholding from present use the church in which the persons assembling had come to engage in worship; and surely, if this was done, *as an owner*, rightful or not, it would not constitute the grounds for a criminal prosecution, as it would not for a civil action, unless at the instance of the

party having title This is fully warranted by *State* v. *Hanks*, 66 N. C., 612; *State* v. *Ellen*, 68 N. C., 281; *State* v. *Hause*, 71 N. C., 518; *State* v. *Crosset*, 81 N. C., 579; *State* v. *Ramsay*, *ante*.

From the evidence it seems that there were two parties claiming the church, each of whom had posted up notices forbidding the other to enter upon the premises, and that the defendant, with his associates, took prior possession, and when the leader of the other party came, he and his associates were unable to enter, and out of this controversy springs the present prosecution, and accordingly each claims himself to have been disturbed by the other.

The exclusion of the evidence tendered, as we understand the proposal to prove the *bona fides* of the defendant's conduct in taking and maintaining possession, is an error entitling the defendant to a *venire de novo*, and it is so adjudged.

Error. *Venire de novo.*

STATE v. J. M. SMITH.

Town Charters— Working on the Streets Compulsory—The Code, §§ 3803, 3818, 3820, 3827.

1. The charter of a town authorized its commissioners to adopt ordinances and regulations "for the improvement of the streets." The town commissioners passed an ordinance requiring all male citizens, between the ages of eighteen and forty-five years, to work a certain number of days on the streets, and imposing a fine or imprisonment for wilful refusal so to do: *Held*, that such ordinance is valid, and a violation of it was a misdemeanor, within the jurisdiction of the Mayor of the town, under *The Code*, §§ 3818, 3820.

2. All towns have the right to enforce such ordinances as the above, unless inconsistent with their charters, by virtue of *The Code*, §§ 3803, 3827.

STATE *v.* SMITH.

CRIMINAL ACTION, tried before *Philips, J.*, at Spring Term, 1888, of RICHMOND Superior Court.

The defendant was arrested by virtue of a criminal warrant, issued by the Mayor of "the town of Rockingham," on the 11th day of February, 1888, wherein he was charged with having violated the *ordinance No.* 20 of that town, in that, on the 27th day of January, 1888, he "did unlawfully and wilfully fail to attend and work the streets and roads of the town of Rockingham, after being legally summoned so to do by the Town Constable," &c.; and he was taken before the mayor, before whom he confessed that he had so refused to work on the said streets and roads; whereupon the Mayor gave judgment that he be fined the sum of two dollars, and he, having excepted, appealed to the Superior Court of the county of Richmond. In the latter Court he pleaded formally, not guilty.

On the trial, the jury rendered a special verdict to the effect that the defendant was, at and before the time specified, between the ages of 18 and 45 years; that he wilfully failed and refused to attend and work on the streets and roads of the town mentioned in the warrant, after he had been duly notified so to do; that he was a tax-payer of that town; that no part of the taxes levied for defraying its expenses were applied to keeping the streets and roads therein in repair, and in opening the same, except for the purchase of lumber for the sidewalks and building bridges on the streets laid out but not completed; that the said *ordinance No.* 20 provided as follows, that is to say: "That every male citizen residing in the corporate limits of said town, between the ages of eighteen and forty-five years, shall work the streets and roads of the town, under the direction of the Town Constable, three or more days in each year, that may be necessary to keep said streets and roads in a good condition. Any person liable to work on the streets and roads, who shall wilfully fail to attend and work

when summoned so to do, after notice of two days, by the town constable, shall be guilty of a misdemeanor, and fined two dollars, or imprisoned two days, upon conviction before the Mayor of said town."

The Court being of the opinion that the defendant was not guilty, a verdict to that effect was entered; thereupon, the Court gave judgment for the defendant, and the Solicitor for the State, having excepted, appealed to this Court.

The Attorney General and *Mr. E. C. Smith*, for the State.
No counsel for the defendant.

MERRIMON, J. (after stating the facts). The statute (*The Code*, § 3820) makes it a misdemeanor for any person to violate an ordinance of a city or town, punishable by fine not exceeding fifty dollars or imprisonment not exceeding thirty days. And it (§ 3818) gives the Mayor, or other chief officer of towns or cities, jurisdiction of such offences. *State* v. *Cainan*, 94 N. C., 880; *State* v. *Wood*, *ibid.*, 855. So that the Mayor had jurisdiction of the offence charged in the warrant, if, indeed, it was committed, and this depends upon the validity of the ordinance in question. It is not denied that the defendant violated it, as charged, if it had validity.

The "town of Rockingham" is incorporated, and its charter (Pr. Acts 1887, ch. 101, § 19) confers upon its Commissioners very large and comprehensive powers. It provides that they "shall have power to make such by-laws and adopt such regulations or ordinances for the government of said town as a majority of them may deem necessary to promote the interest and insure the good order and government of said town, for the *improvement of the streets*, and the preservation of the health in the same, and to make all such other police regulations as the interest, comfort and convenience of the citizens of said town may require;" and section 26 thereof empowers them "to open and lay out any new

street or streets within the corporate limits of said town, * * * to widen, enlarge, make narrower, change, extend, or discontinue any street or streets, or any part thereof, within the corporate limits thereof," &c.

In the absence of some provision otherwise appearing, expressly or by reasonable implication, the power thus conferred implied the further power and authority to employ means appropriate to accomplish such important purposes. Otherwise, the power conferred to improve, repair and keep in repair existing streets, and to open and change others, would be useless and nugatory. It is not to be presumed that such practical absurdity was intended.

It did not contravene any principle of law or any statutory provision to require all male residents of the town between the ages of eighteen and forty-five years to render reasonable compulsory services for such purpose, notwithstanding they may have paid taxes for other purposes. Every one may, in a proper way, be required to contribute of his personal services, or his means, in the shape of assessments of money, or taxes proper, towards the due administration and enforcement of all just police regulations properly established. This is a part of the price he must pay for the support, advantage and protection of the government under which he lives, and of which he takes benefit in the protection of his life, liberty and property. Government could not live and be efficient without such exactions and contributions properly applied.

The laws of this State from the earliest period of its existence have required the ordinary highways to be laid out and kept in repair, mainly, if not altogether, by compulsory services of the inhabitants of the districts or localities in which they were situate. Such assessments or exactions of service is a public charge, in addition to ordinary taxes, and is an appropriate means of keeping the public roads in proper

repair, and there is no legal reason why streets and roads within towns and cities may not be laid out, and be kept in repair by the like means, if their charters so allow. Cooley on Const. Lim., 637, 638; Dill. on Mun. Corp., secs. 678 (and note), 762.

The Commissioners had ample power to make the *ordinance* in question. The charter gave them authority, as we have seen, to "adopt such regulations or ordinances for the government of said town as a majority of them may deem necessary to promote the interest and insure the good order and government of said town, *for the improvement of the streets*," &c., and there is no word or provision in it that restricts the power in respect to the manner or method of keeping the streets in repair. This Court, in *State* v. *The Commissioners of Halifax*, 4 Dev., 345, in interpreting a charter provision substantially like that we now have under consideration, held that the Commissioners of Halifax had authority to require the inhabitants of the town, subject to work on the public roads, to work on the streets.

That case is very much in point here, and fully sustains what we have said.

But if there could be any doubt as to the interpretation of the provision in question, it is removed by the general statute (*The Code*, § 3803), in respect to *towns* and *cities*, which expressly confers upon the Commissioners thereof power to require streets to be laid out and kept in repair by assessments of labor against the inhabitants thereof. This provision is applicable to "the town of Rockingham," because not inconsistent with its charter, or any particular statutory provision in respect to it (*The Code*, § 3827).

There is, therefore, error. The Court should, upon the special verdict, have directed a verdict of guilty to be entered and given judgment upon the same. The verdict of not

guilty must be set aside, and a verdict of guilty entered, and further proceedings had in the Court below according to law. To that end, let this opinion be certified to that Court.

Error. Reversed.

THE STATE v. ROBERT OAKLEY.

False Pretence—Intent—Special Verdict—When to be Set Aside.

1. In an indictment for obtaining money by false pretence the *intent* to defraud is an essential element in the offence, and therefore a special verdict, in which it was not found that the defendant had the *intent* either to defraud or not to defraud, is defective.
2. A special verdict should find all the facts material to the determination of the issues raised by the pleadings, and if it fails to find any material fact it should be set aside and a new trial ordered.

FALSE PRETENCE, tried before *Bynum, J.*, at Spring Term, 1888, of the Superior Court of GUILFORD.

The defendant is indicted for obtaining money by false pretence in violation of the statute (*The Code*, § 1625). He pleaded not guilty, and on the trial the jury rendered a special verdict, finding facts, but omitting to find that he had the *intent* either to defraud or not to defraud. The Court held that upon the facts found, he was not guilty. That verdict was entered, and thereupon there was judgment for him, from which the Solicitor for the State—he having excepted—appealed to this Court.

The Attorney General, for the plaintiff.
No counsel for the defendant.

MERRIMON, J. The *intent* to defraud is an essential element of the offence charged in the indictment, and as it was not found by the special verdict that the defendant had, or had not, such intent in connection with the material facts charged, the Court could not properly decide upon the facts found that he was guilty or not guilty, and hence it erroneously directed the verdict of not guilty to be entered. The special verdict was void, because the jury failed to find by it a material fact, and the Court should have quashed it, and directed a new trial, or it might, before the jury was discharged, have directed them to find the fact omitted from their verdict as part of it. A special verdict must always embrace all the facts material to the determination of the issue of fact raised by the pleading; otherwise, it is imperfect and void, and the Court cannot apply the law. In such case the material facts do not appear.

The issue raised by the plea of not guilty has not been tried in contemplation of law, and, therefore, there must be a new trial. This is well settled by numerous decisions of this Court. *State* v. *Bray*, 89 N. C., 480, and cases there cited.

The judgment and verdict must be set aside, and a new trial ordered. To that end, let this opinion be certified to the Superior Court. It is so ordered.

Error. New trial.

STATE v. DAVID C. SMITH.

Warrants; Amendment of, in Superior Court.

The Superior Court has power to *amend.* after verdict, a warrant brought by appeal of defendant from a Justice's Court, charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "wilful and unlawful," and to make the charge conclude, "against the peace and dignity of the State."

INDICTMENT, for going upon the land of another, after being forbidden, tried before *Armfield, J.*, at January Term, 1889, of the Superior Court of PITT.

The defendant was arrested upon a criminal warrant, issued by a Justice of the Peace, charging him with going upon the land of another without a license, having first been forbidden to do so, in violation of the statute (*The Code*, § 1120). He pleaded not guilty, and was convicted in the Court of the Justice of the Peace, and from the judgment there against him he appealed to the Superior Court, and on the trial, in that Court, there was a verdict of guilty; whereupon, he moved an arrest of judgment, upon the ground, that it was not charged in the warrant that the entry upon the land was "wilful and unlawful," and that the charge did not conclude "against the form of the statute." Upon the motion of the Solicitor for the State, the Court allowed the warrant to be amended in the respects mentioned, overruled the motion in arrest of judgment, and gave judgment against the defendant, from which he, having excepted, appealed to this Court.

The Attorney General, for the State.
Mr. C. M. Bernard, for the defendant.

MERRIMON, J. (after stating the case). The amendment of the warrant allowed did not change the nature of the offence charged, or affect the substance thereof, nor did it deprive the defendant of any defence he might or could have made. The power of the Superior Court to allow such amendments is very comprehensive, and is intended to help actions and proceedings, both civil and criminal, beginning in courts of Justices of the Peace. This authority to exercise such power has been repeatedly considered by this Court, and is well settled. *State* v. *Vaughan*, 91 N. C., 532; *State* v. *Crook, ibid.*, 536; *Singer Mfg. Co* v. *Barrett*, 95 N. C., 36.

Very clearly the Superior Court had power to allow the amendments complained of, and properly did so.

No error. Affirmed.

THE STATE v. TOM. FARRAR.

Record—When Case Remanded for Defects in Transcript of—Amendment, Nunc pro Tunc.

1. The transcript of the record sent to this Court in a State case, failing to show that a Court was held by a Judge at the time and place prescribed by law, that a grand jury was drawn and sworn and presented the indictment, that the plea of not guilty was formally entered, is fatally defective, and the Court will not proceed to decide the question presented in the assignment of error, but will remand the case, that the record may be perfected.
2. Where a defendant was tried in the Court below, as upon a plea of not guilty, the Court, at a subsequent term, ought, upon the facts being made to appear, to direct the plea to be entered *nunc pro tunc.*

Motion to dismiss an appeal in an indictment for LARCENY, tried at February Term, 1889, of CHATHAM Superior Court.

The Attorney General, for the State.
No counsel for the defendant.

MERRIMON, J. The transcript of the record of this appeal fails to show that a Court was held by a Judge at the time and place prescribed by law, that a grand jury was drawn, sworn and charged, that a grand jury presented the indictment set forth in what purports to be the record in open Court or at all, that the plea of not guilty was formally entered, and there are other defects of less importance. It is fatally defective, and we cannot decide the question intended to be presented by the assignment of error.

The Attorney General, insisting that the appeal is without merit, moved to dismiss it for the causes stated.

Enough is presented, by what purports to be the transcript of the record, to satisfy us that there is very probably in the Court below a perfect record, or one that may be perfected, and we see also that it may be that the defendant can assign such grounds of error as might entitle him to a new trial. He is charged with larceny, the offence is serious, and we therefore deem it safe and proper to remand the case, to the end that the record may be perfected, if it is not so, and a perfect transcript thereof sent to this Court, as the law requires to be done.

If the record does not fully set forth what was done in the course of the action—as, for example, that the grand jury was drawn, sworn and charged, and presented the indictment in open Court, or that the plea of not guilty was formally entered of record, when it was so treated by the Court and parties, but was not so entered, by inadvertence, the Court might—ought—the facts properly appearing, to direct a proper entry to be made *nunc pro tunc*. Plainly, the Court has the power, and it is its duty, to make its record express the truth in all respects.

This Court has frequently, in the exercise of a sound discretion, with the view to justice, remanded cases not unlike the present one. *State* v. *Butts*, 91 N. C., 524; *Spence* v. *Tapscott*, 92 N. C., 576; *State* v. *McDowell*, 93 N. C., 541; *State* v. *Johnston*, 93 N. C., 559; *Holly* v. *Holly*, 94 N. C., 639; *Holly* v. *Holly*, 96 N. C., 229.

Remanded.

STATE v. C. C. WALKER.

Indictment—Selling Liquor to Minors.

Where a father sent his minor son to buy whiskey, for his (the father's) use, and the dealer delivered the whiskey to the son, knowing it was for the father: *Held*, that the seller was not guilty of selling to a minor, under § 1077 of *The Code*.

INDICTMENT, for selling intoxicating liquor to a minor, tried before *MacRae, J.*, at Fall Term, 1888, of the Superior Court of BEAUFORT.

The defendant was indicted under § 1077 of *The Code*.

The indictment contained two counts, one for selling, and the other for giving, intoxicating drinks and liquors to one Fred. Gardner, who was under twenty-one years of age and unmarried.

The evidence was, in substance, that Fred. Gardner, an unmarried youth, about nine years of age, was the son of John Gardner; that John Gardner sent Fred. to one Bergeron, who was admitted to be a liquor dealer, and for whom Walker was clerk, for whiskey, and that Walker delivered it to Fred., for his father, by the direction and upon the

order of the father. The son testified, among other things: "I do not drink; the defendant knew that all the liquor was for papa," &c.

The father testified, in substance, that he sent his son Fred., either with an order or the money, for whiskey, and that it was for his (the father's) own use, and that prior to his instruction to the defendant he had refused to send him whiskey by the son.

The defendant asked the Court to instruct the jury:

"1. That if the defendant knew the liquor was for the father and not for the minor, and that the minor was only a messenger for the father, defendant is not guilty.

"2. That the father had the right to use his son as a messenger to carry liquor to him.

"3. That if the father purchased liquor for himself, and the defendant knew this, under the facts as testified in this case, it would be a sale to the father and not to the son, and the defendant would not be guilty."

These instructions were declined, and "the Judge instructed the jury that, if they believed the evidence, the defendant was guilty."

Defendant excepted. There was a verdict of guilty, judgment and appeal.

The Attorney General, for the State.

No counsel for the defendant.

DAVIS, J. (after stating the case). We are unable to see how this, upon the facts stated, can be regarded as either a sale or a gift to the minor. It was not a *gift* to anybody. It was a *sale* to the father, and the son was only a messenger; it was not a sale to the son.

The cases of *State* v. *Laurence*, 97 N. C., 492, relied on by the Attorney General, are not applicable to this case. In those cases the sales or gifts were made to minors and for

the *use* of the minors. In the former case the father had given the liquor dealer permission to give spirituous liquors to the son, and it was properly held that the permission of the father cou'd not "suspend the statute" and authorize a sale or gift of intoxicating drink to the son. In the case before us, the sale was made to the father and for the father, and it was only sent by the son as a messenger for the father.

The Court can only pass upon the law applicable to the facts, and the very forcible argument of the Attorney General was addressed rather to the moral than the legal aspects of the case.

Prior to the emancipation of slaves, it was unlawful to give or sell liquors to a slave, without the written consent of the owner or manager of the slave. In *State* v. *McNair*, 1 Jones, 180, the defendant was indicted; the proof was that the defendant had delivered liquor to a slave upon the order and for one Higgs, who was the overseer. This Court held a conviction and judgment upon this evidence to be erroneous, and NASH, C. J., said: "The act under which the indictment is found had no intention to abridge the legitimate use of his slave by the owner; it is still left him; it is not denied he may use him as his agent." Fred Gardner was but the agent or messenger of his father—the sale was to the father.

Error. New trial.

STATE v. JAMES STOVALL.

Agricultural Societies—Police Regulations—Constitutional Law.

1. The provisions of ch. 33, Acts of 1887, amending the charter of the Roanoke and Tar River Agricultural Society, incorporated under chapter 88, Private Laws of 1870–'71, which forbids any person, not doing a regular business within half a mile of the grounds of the society, from selling, &c., any liquors, tobacco, or other refreshments, &c., within that distance from said grounds, and making it a misdemeanor so to do, is constitutional—not violating section 7, Article I, as to *exclusive emoluments* or *privileges*, nor section 31, as to *perpetuities* and *monopolies*.
2. The power of the Legislature to enact laws conferring police powers, regulating traffic, &c., in certain localities, &c., is established, and such power is properly exercised for the encouragement of agricultural societies, and providing regulations for preserving order and promoting the comfort, &c., of those assembled at their fairs.

INDICTMENT for selling liquors, tobacco, &c, within one-half mile of the fair grounds of the Roanoke and Tar River Agricultural Society, contrary to law, tried before *Graves, J.*, at Spring Term, 1888, of the Superior Court of HALIFAX County.

The jury rendered the following special verdict: "The Roanoke and Tar River Agricultural Society is a corporation, having been incorporated under the laws of North Carolina, chapter 88, Private Laws 1870–'71, which said act of incorporation was amended by the act hereunto annexed and by chapter 33, Private Laws of 1887. All of said acts are made a part of this case.

"That during the annual fairs held by the said Society since the beginning and during the fair held on its grounds during the year 1887, privileges were leased to many parties to sell liquors, tobacco and refreshments, and goods, wares and merchandise, and the same were sold during its continuance within its said grounds.

"That the defendant, James Stovall, leased a stand upon the lands of one R. W. Daniel, within one-half mile of the grounds of said association, and was engaged in selling food and refreshments during the holding of said annual fair of 1887, until he was arrested at the instance of said association. Said defendant was not doing regular business within the prohibited territory.

"The above facts are found by the jury as a special verdict, and if his Honor is of opinion that the defendant is guilty, then the jury find him guilty."

By chapter 88, Private Laws 1870–'71, the Roanoke and Tar River Agricultural Society was duly incorporated.

This act of incorporation was amended by chapter 33, Acts of 1887, limiting the capital stock of the company to $5,000, to be divided in such number of shares as the incorporators might determine, and by chapter 39, Acts of 1887, by adding the following section:

"That it shall be unlawful for any person or persons, individual or corporate, to sell or offer for sale any liquors, tobacco or other refreshments of any kind whatsoever, or any goods, wares or merchandise of any kind, within one-half mile of the grounds of said association, during the week of their annual fair. Any one violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not to exceed two hundred dollars. This act shall not apply to persons doing regular business within the prohibited territory."

Copies of the several acts referred to are annexed and made a part of the verdict, but it is not necessary here to set them out more fully than above.

"Upon said verdict the Court adjudged the said James Stovall to be guilty," and there was a judgment, and defendant appealed.

The Attorney General, for the State.

Messrs. T. N. Hill and *J. M. Mullen*, and *W. E. Daniel* (by brief), for the defendant.

DAVIS, J. (after stating the case). The defendant insists that the statute under which he is indicted is unconstitutional; that by the amendment in ch. 33, Private Acts of 1887, the Roanoke and Tar River Agricultural Society lost its original character and became a joint stock company, and the effect of the prohibitory section is to confer upon the association privileges denied to individuals, and is therefore in violation of Art. I, sec. 7, of the Constitution, which declares that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community, but in consideration of public services," and also of section 31 of the same article, which declares that "perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."

We are unable to see that any privilege or right is conferred upon "any man or set of men" which is denied to others, nor are we able to perceive that any "perpetuities or monopoly" is created by the act. Neither the corporation nor the corporators, nor any one else, can lawfully do, "within one-half mile of the grounds of the Roanoke and Tar River Agricultural Association," what the defendant is charged with having done. Whether the society can grant privileges "within" its grounds, under such regulations as it may prescribe, is not presented for our consideration, but we can see nothing in the prohibitory section to prevent it.

The power of the Legislature to enact laws conferring police powers and regulating traffic, &c., within particular localities, seems to be well settled. *Intendent and Comm'rs of Raleigh* v. *Sorrell*, 1 Jones, 49; *State* v. *Muse*, 4 D. & B., 319; *Muller* v. *Commissioners*, 89 N. C., 171; *State* v. *Joyner*, 81 N. C., 534. Sections 1079, 3670 and 3671 of *The Code* impose restrictions

and regulations, the constitutionality of which have never been questioned. No vested rights are interfered with by such regulations. Cooley's Const. Lim , 746 to 750, 594 to 598; *Phelps* v. *Raney*, 60 N. Y., 10.

Organizations such as the Roanoke and Tar River Agricultural Society are justly considered of public benefit, and large numbers of people congregate at their fairs, and from the very nature of such assemblies, regulations for the preservation of order are necessary, and the Legislature has the power to enact such laws and provide for such regulations as will preserve the good order and promote the interest and comfort of those who assemble for purposes of pleasure or for the advancement of agricultural interests. The statute deprives no one of any vested right—interferes with no one's "regular business."

No error. Affirmed.

STATE v. ELI WARD.

Burglary—Evidence, Previous Statements of Witness; Declarations of Prisoner in His Own Favor.

1. Upon an indictment for burglary it is competent for the State to show acts and conversations of the defendant which tend to fix him with a knowledge of the location of the premises, and the condition and circumstances of the prosecutor.
2. An impeached witness may be supported by showing previous consistent statements made by him.
3. Declarations of a prisoner, made after the crime was committed, in excuse or explanation of his acts, will not be received in evidence. Such declarations are competent only when they constitute part of the *res gestæ*.

INDICTMENT for burglary, tried before *MacRae, J.*, at January Term, 1889, of the Superior Court of NORTHAMPTON County.

The indictment contains two counts—the first charging the burglarious entering, with intent to kill and murder, and the second with intent to steal.

It was in evidence that, on the night of the 11th of January, 1889, the dwelling-house of W. H. Farmer was entered about midnight, by breaking through the window, and a most violent assault made upon the said Farmer, the burglar using a razor; and after a desperate struggle, in which the said Farmer was cut in several places with the razor, the burglar made his escape, having been first severely wounded by Farmer, who had wrested the razor from him and inflicted the wound therewith.

There was much evidence tending, overwhelmingly, to identify the prisoner as the burglar.

The witness W. H. Farmer, whose testimony is sent up with the record, details with minuteness, and at much length, the occurrence, and incidents connected therewith, in which, among other things, he said that he did not recognize the person who broke into his house, but knew that he was a colored man from his hair, and that a hat was left in the room by the burglar, which was afterwards identified as the prisoner's; that the prisoner had been at his house about 10 o'clock on the night of the burglary to see him, as prisoner said, about some cotton which he had promised to deliver, but had failed to do so; "that he (the prisoner) did not come but once that night; that I (he) recognized him. He had been there four or five times at night inside of two weeks, and once in the day he came to the store."

The prisoner objected to the testimony "that the prisoner had been there previous to the night of the alleged burglary."

Objection overruled. Prisoner excepted. This constitutes the first exception.

One Lewis Jordan, a witness for the State, testified that he saw the prisoner the day after the burglary, and details what occurred, and, among other things, that the prisoner

said one Farmer made him mad over a bale of cotton, and that "he broke in on him to kill him," and that he (prisoner) "got cut mighty bad."

The cross-examination of this witness tended to impeach him, and one D. A. Jordan was introduced and permitted to state what Lewis Jordan had told him, and that it was "almost identically the same as testified on the trial." This testimony was admitted, after objection, in corroboration of Lewis Jordan. This constitutes the defendant's second exception.

The counsel for the prisoner "proposed to ask this witness what statement the prisoner made before the Magistrate." Objected to by the State, as (made) at a different time from any statement brought out by the State. Objection sustained and prisoner excepted. This constitutes the third exception.

One Daniel Bishop, a witness for the State, testified that Mr. Farmer was married in December, and that when he went off to get married, witness stayed in his house; that "while Farmer was absent, Eli came the night Farmer went away, to see Farmer; it was about 9 P. M. when he came * * * He knocked at the door and said, 'Is Mr. Farmer in?' I said 'No; who is that?' He said, 'It is Eli Ward.' Said he wanted to see Mr. Farmer. Asked if he could come in. Witness said, 'O yes.' He came, sat down, and asked witness if he was attending to Mr. Farmer's house till he came. Was told that witness was. Prisoner asked witness if he was not 'afraid to stay there of nights;' was answered 'No.' He said, 'I suppose you have plenty of weapons to keep you from being afraid?' Witness said, 'Yes, plenty—a double-barreled gun, two pistols and two black-jacks." He asked witness, 'Don't you want a drink?' We took a drink. He got sleepy—got to nodding. I said, 'Eli, the clock struck 11.' He said, all right; said tell Mr. Farmer he was coming again to-morrow night. I said he wouldn't be there to-

morrow night. He said he and Mr. Farmer had right smart dealings together—that Mr. Farmer had plenty of money there in the safe. I told him I reckoned he had right smart of paper, but not much money. He said he had right much dealings with Mr. Farmer. He had shown him in there, and he knew there was money in there. He told me to tell Farmer that he was coming back to see him. He asked me did I have my gun loaded. I told him yes; I showed him the gun and pistols. They were not really loaded." Objection by the prisoner to all of the testimony of Daniel Bishop. Objection overruled; defendant excepts. This constitutes the fourth exception.

There was a verdict of guilty, judgment, and appeal by defendant.

Attorney General, *Messrs. R. B. Peebles* and *W. C. Bowen*, for the State.

No counsel for the defendant.

DAVIS, J. (after stating the facts). The evidence sent up with the record can leave no reasonable doubt as to the fact that the prisoner is the person who entered the house of W. H. Farmer on the night of January 11, and it tends strongly to show both the intent to murder and to steal, and there are not conflicting intents, and either was sufficient.

The first and fourth exceptions may be considered together, as the admissibility of testimony excepted to in each rests upon the same principle, namely, that each tends to fix the prisoner with a knowledge of the location, condition and circumstances of W. H. Farmer.

In *State* v. *Howard*, 82 N. C., 623, the defendant was indicted for murder. The deceased was robbed on the night of the homicide, and it was offered in evidence that, twelve months before the homicide, the prisoner said to the witness, "Don't you reckon that if any one was to run in on old

man Babel Autrey (the deceased) he could get a handful of money?" The Court said: "The evidence of this conversation is clearly admissible, if for no other purpose, that it tended to affect the prisoner with a knowledge of the reputation that the deceased had money in his house"—it was in proof that he had that reputation.

We do not approve of the form in which the objection is taken to the testimony of the witness Bishop. It is "to all the testimony" of the witness, and seems to have been taken after it was all in, and the whole of it as sent up with the record in useless detail, though some of it was useless as harmless, but it was not incompetent.

The second exception was to the admission of the statements made by Lewis Jordan to D. A. Jordan for the purpose of corroboration. It is well settled, at least in this State, that it is competent to support the testimony of an impeached witness by showing previous statements made by him consistent with those testified to on the trial. *State* v. *Whitfield*, 92 N. C, 831, and cases cited.

The third exception is to the refusal to admit the declarations of the prisoner, made at a time different from those called out by the State. In *State* v. *McNair*, 93 N. C., 628, the Chief Justice said: "It is settled by repeated adjudications, that declarations of a prisoner, made after the criminal act has been committed, in excuse or explanation, at his own instance, will not be received, and they are competent only when they accompany and constitute part of the *res gestæ*." This case and the authorities there cited conclusively dispose of the defendant's third exception adversely to him.

No error. Affirmed.

STATE v. ROBERT POWELL.

Larceny, Not Necessary that the Taking be Secretly Done—Property laid in Bailee—Indictment.

1. While *secrecy* is the usual evidence of a felonious intent when one takes the goods of another, it is by no means the only evidence of such intent.
2. Prosecutor dropped some money and the prisoner caught it up. Prosecutor asked for the money, whereupon prisoner said: "Oh, hell! You ain't going to get this money." Prosecutor started toward prisoner and prisoner put his hand to his breast and threatened to kill prosecutor if he followed him: *Held*, that it was proper to instruct the jury, that it was for them to say whether the taking of the money was with a felonious intent or not.
3. The ownership of property stolen can be charged in an indictment for larceny as being in a bailee.
4. A bill of indictment charging A with larceny, and containing a count against B for aiding, &c., will be sustained, it not being shown how A was prejudiced thereby.

INDICTMENT for larceny, tried before *MacRae, J.*, at January Term, 1889, of NORTHAMPTON Superior Court.

The indictment charged the defendant, Robert Powell, and one William Bailey, with the larceny of twenty dollars, the property of John Whitaker, and contained a second count charging said William Bailey with aiding, &c., said Powell in stealing, &c., the same twenty dollars.

Powell pleaded not guilty, and was put on his trial. Bailey was not tried.

John Whitaker, a witness for the State, being the person whose money was alleged to have been stolen, testified in substance as follows: On a certain day he went to Weldon for some bagging, and carried with him about forty dollars, the property of Mrs. Coker, to get it changed for her. William Bailey saw him with the money and watched him pretty

closely until he got through trading. Witness and Bailey left Weldon together, and crossed the bridge. While crossing the bridge witness saw the defendant Powell about thirty yards ahead. After crossing the river, witness proceeded to count his money, of which he had some silver, and twenty dollars in "greenbacks." He commenced to put the silver in a sack, and in doing this dropped the twenty dollars in "greenbacks," which consisted of four five-dollar bills. The defendant, Robert Powell, caught it up—the four five-dollar bills that had been dropped. "I asked him for it like a gentleman, and he said: 'Oh, hell! You ain't going to get this money.' I run my hand in my pocket for my knife. Bailey held me. Defendant went off with my money. I got loose from Bailey and started after defendant. He put his hand to his breast and threatened to kill me if I followed him." Witness then went back to Weldon and had the defendant arrested.

On cross-examination he said that some of the money was his and some was Mrs. Coker's, and he could not exactly tell whose money the four five-dollar bills were. He had some money and he carried some for Mrs. Coker to get it changed. Had paper money of his own when he went to Weldon; thought he had a bill as large as ten dollars. He denied the truth of the matters testified to subsequently by the defendant.

The above was the case for the State.

The defendant testified, in substance, that he had won the money, about which Whitaker had testified, in a wager with Whitaker; that Bailey was stake-holder, and had handed him the money after he had won it.

After introducing some further testimony, tending to corroborate his statement and to impeach the testimony of Whitaker, the defendant closed his case.

The defendant's counsel asked the Court to charge:

"1. That defendant is not guilty according to the evidence.

"2. That if the witness John Whitaker was the servant or agent of Mrs. Coker, and the money taken was the property of Mrs. Coker, it should have been so charged in the bill of indictment."

These instructions were refused, and defendant excepted.

His Honor charged the jury:

"1. The first question is as to the property. Was the money the property of Whitaker as charged in the indictment? If the money was intrusted by Mrs. Coker to Whitaker, to carry to Weldon and have changed for her, and he did take it to Weldon and have it changed, and was carrying it back to her, he had a special property in the money while it was in his possession, and it was properly charged in the bill as Whitaker's property.

"2. Did the defendant steal it? If Whitaker dropped the money and defendant caught it up, and when Whitaker started after him another man held him, and the defendant went off, and upon Whitaker's getting loose from the man who held him, and starting in pursuit of defendant, the defendant threatened to kill him if he followed him, it is for you to say whether the taking of the money by the defendant was with the felonious intent to deprive the owner of his money and convert the same to his own use. Did he intend to steal it when he took it? If he did, he is guilty. If he did not, he is not guilty.

"3. If the evidence of the defendant is the true statement of the matter, he is not guilty."

There was a verdict of guilty, and defendant was sentenced by the Court.

Defendant appealed, and assigned error as follows:

"1. His Honor erred in refusing the instructions prayed for.

"2. His Honor erred in the instructions given.

"3. His Honor having instructed the jury that, 'if the evidence of the defendant is the true statement of the mat-

ter, he is not guilty,' he should have instructed that, according to the evidence of Whitaker, the offence was not larceny, but trespass.

"4. Because of errors in the charge concerning the ownership, and the averment of the ownership of the money.

"5. Because of a count in the bill of indictment against William Bailey as accessory.

"6. Because of any and all other errors appearing in the record."

The Attorney General, for the State.

No counsel for the defendant.

SHEPHERD, J. The defendant contends that he is not guilty, because "there was no artifice to conceal the fact that he had gotten the money in his possession; that there was no effort to conceal the fact of the taking, and that the prosecutor knew who had his money, and against whom to bring his action."

For these positions he relies upon *State* v. *Deal*, 64 N. C., 270, and *State* v. *Sowls*, Phil., 151. The proposition is, that there can be no felonious intent where the taking is done openly and there is no effort to conceal.

State v. *Deal*, *supra*, is a leading case in this State upon the subject of felonious intent in larceny, and while the conclusion reached by the Court is generally regarded as correct, much that is said in the opinion has been questioned, and the doubts which have arisen have been greatly strengthened by the forcible dissenting opinion of Mr. Justice RODMAN. It will be observed that, in addition to there being no effort to conceal in that case, there was another element which was sufficient to have entitled the defendant to a new trial: that was, as the learned Chief Justice says, "a seeming excuse for the artifice by which he (Deal) got possession of the note. * * * The defendant alleged that the title to the land for

which he had executed his note was not good, for that it was subject to a dower right; and, being dissatisfied with this state of things, he resorted to a trick to get hold of the note, for the purpose of cancelling it." The trial Judge did not submit this view to the jury, and the defendant was thus deprived of the "seeming excuse" for his conduct.

We think that this view of the case had much to do with the decision of the Court, and in this we are sustained by Whar. Crim. Law, vol. 2, sec. 1787, where the author, speaking of *State* v. *Deal*, says: "It was held that this was not larceny, larceny implying stealth, and this being a forcible taking *under color of right*."

We shall not attempt to "run and mark" the shadowy line between trespass and larceny, but we cannot yield our assent to the inference drawn by the defendant from the language of the opinion, that there can be *no* case of larceny unless there is an effort to conceal on the part of the offender.

The language quoted in the opinion from Judge HENDERSON has never passed into judicial decision, and we have been unable to find in our edition of Foster, cited in *State* v. *Sowls*, *supra*, anything in support of the doctrine that the taking must be done in such "a manner as to show an intent to defraud the owner, by concealing from him who took it, so that he shall not know what has become of his property and against whom to bring his action to recover it."

As far as our investigations have extended, we have found no such criterion laid down in any of the books. True, Mr. Wharton, in his Criminal Law, vol. 3, § 1876, states that where the taking is openly done, it is but a trespass, and, perhaps, similar expressions may be found in other modern works, but upon reference to the notes it will be seen that they are based upon Hale, P. C., 509, where it is said that if the taking is done openly it "carries with it an evidence only of a trespass;" but these authors fail to add the following language of Lord HALE, used in the same connection: "But in cases of larceny the variety of circumstances is so great and

the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent or the contrary, but the same must be left to the due and attentive consideration of the Judge and jury; wherein the rule is, *in dubiis*, rather to incline to an acquittal than conviction." From which, it seems, says Judge RODMAN, "that Lord HALE did not think an open manner of taking inconsistent with larceny, but only a circumstance, from which the jury might infer an absence of felonious intent."

We fully concur with the Chief Justice and Judge HENDERSON, that a prominent feature of larceny is "that the act be done in a way showing an intent to evade the law, that is, not to let the owner know who took the property," etc, but we cannot agree that this is the *only* way the felonious intent may be manifested in larceny, any more than that concealment, as the Chief Justice suggests, is necessary in robbery. It is true, as Blackstone says, vol. 4, 232, that "the ordinary *discovery* of a felonious intent is where the party doth it clandestinely, or being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animus furandi;* wherefore they must be left to the due and attentive consideration of the Court and jury." To the same effect is that accurate and discriminating writer, Mr. Chitty, who, in his vol. 3, 927, on Criminal Law, says that "the openness and notoriety of the taking, where possession has not been obtained by force or stratagem, is a strong circumstance to rebut the inference of a felonious intention (1 Hale, 507; East, P. C., 661, 662); *but this alone will not make it the less a felony* (Kel., 82; 2 Raym., 276; 2 Vent., 94)." * * * On page 926, he says: "Where the taking exists, but without fraud, it may amount only to a trespass. This is also a point frequently depending on

circumstantial evidence, and to be left for the jury's decision." East, P. C, vol. 2, 662, after speaking of the evidences of a felonious intent, says: "And the circumstances of the party's offering the full value or more at the time ought to be left to them (the jury) to show that his intention was not fraudulent, and so not felonious, for it does not necessarily follow, as a *conclusion of law*, that if the value of the thing taken be offered to be paid at the time, the intent is, therefore, not felonious, though it is, I apprehend, pregnant evidence of the negative." Greenleaf Ev., vol. 3, sec. 157, sustains the view that the mere fact of the taking being without concealment, is evidence which should be left to the jury. He says that it "would be pregnant evidence *to the jury* that the taking was without a felonious intent."

In *Vaughn's Case*, 10 Grattan, 758, the defendant was held guilty of larceny of his bond, under circumstances similar to those in *State* v. *Deal*. MONCURE, J., dissented, on the ground that the bond was given for land; that there was a controversy about the boundaries, etc., and that this, in connection with the open manner in which it was taken, showed that there was no felonious intent. He expressly admits that concealment is unnecessary. It is true, he says, "that secrecy, though a usual, is not a necessary, attendant of larceny, which may be, and sometimes is, committed openly." None of the definitions of larceny require that the taking be done secretly.

It must be done, says Foster, 124, with a wicked, fraudulent intention, which is the "ancient known definition of larceny: *Fraudulenta obtrectatio rei alienæ invito domino.*"

Lord HALE, P. C., 508, says: "As it is *cepit* and *asportavit*, so it must be *felonice* or *animo furandi;* otherwise, it is not felony, for it is the *mind* that makes the taking of another's goods to be a felony or a bare trespass only; but because the intention and mind are secret, the intention must be judged by the circumstances of the fact."

"The felonious intent, or *animus furandi*, means an intent fraudulently to appropriate the goods. Whether the intent existed or not, is entirely a question for the jury, which, as in all other cases of intent, they must all infer from the words or acts of the defendant or the nature of the transaction." Archbold Crim. Practice and Pl., 2 vol., 6 ed., 366—4.

In his Pleading and Evidence, 3 Am. ed., 173, Archbold thus defines the felonious intent: "But larceny, as far as respects the intent with which it is committed, * * * may, perhaps, correctly be defined thus: where a man knowingly takes and carries away the goods of another, without any claim or pretence of right, with intent wholly to deprive the owner of them, and to appropriate or convert them to his own use."

These authorities, we think, conclusively establish that, while secrecy is the *usual* evidence of the felonious intent, it is by no means the only manner in which it may be proved.

In our case every ingredient of Mr. Archbold's definition is present. The defendant *knowingly* took the goods of another, and he made no *pretence* whatever of any claim or right to them.

It is shown, as clearly as any fact can be shown, that he intended to *wholly* deprive the owner of them, and to appropriate them to his *own use*. And yet it is insisted that because he showed such a reckless disregard of the consequences of his outrageous act, he could not, as a matter of law, have a fraudulent or felonious intent.

The defendant, according to the testimony of the State, "catches up" the money of the prosecutor. When it is demanded, he says to the prosecutor, "Oh, hell! You ain't going to get this money." His companion holds the prosecutor when he attempts to regain the possession. The defendant walks off with the money, and when finally the prose-

cutor releases himself and starts in pursuit, the defendant puts his hand to his breast "and threatens to kill him if he continues to follow."

We think these circumstances afford strong evidence that there existed in the mind of the defendant a fradulent and felonious intent.

Such open taking, where there is neither force nor stratagem, is very unusual, and, as we have seen, is a "pregnant" circumstance in favor of the non-existence of the felonious intent. Strong evidence, therefore, is necessary to sustain a conviction in such case. The circumstances deposed to by the prosecutor clearly pointed to the existence of a felonious intent, and we cannot but think that, if the facts of this case had been presented to the late distinguished Chief Justice, he would have unhesitatingly sustained his Honor in submitting them to the jury.

The principles we have declared dispose of exceptions 1, 2, 3 and 6. Exception 4 is without merit. The prosecutor, it appears, was the bailee of Mrs. Coker, and, therefore, had a special property in the money. See *State* v. *Allen*, decided at this term, and the authorities cited.

We are unable to see how the rights of the defendant were injuriously affected by the count against Bailey. It seems that he was not tried with this defendant, and there is nothing in the record to suggest that the defendant was in any way prejudiced.

No error. Affirmed.

STATE v. ANTHONY ALLEN.

Larceny, Property may be laid in Bailee—Circumstantial Evidence—General Verdict where there are Two Counts.

1. Where A had meat in his possession—in his own smoke-house—keeping it for B, who lived with him, the property may be laid in A in an indictment for larceny.
2. Where the evidence is circumstantial, the accused is not entitled to a charge, that it must be as conclusive as if an "eye-witness" had testified to the fact.
3. A general verdict of guilty on an indictment containing two counts, one for larceny, the other for receiving, is valid, although the jury were instructed to return a verdict of "guilty on the *second* count," if satisfied, &c., from the evidence on the part of the State.

CRIMINAL ACTION, tried before *MacRae, J.*, at January Term, 1889, of NORTHAMPTON Superior Court.

The defendant was charged in the indictment with the larceny of some pork, the property of James I. Deloatch, and there was a second count for receiving the same.

Defendant asked for the following special instructions, which were refused:

"1. The State having proved by the prosecutor, James I. Deloatch, that the pork stolen was the property of Polly Parks, the defendant cannot be found guilty.

"2. The evidence being entirely circumstantial, it must be as strong and conclusive as if one credible eye-witness had testified to the fact."

On the question of circumstantial evidence, the Court instructed the jury, in substance, that the State must prove each fact or circumstance beyond a reasonable doubt, and so as to leave no reasonable hypothesis consistent with the innocence of the accused; "in other words, it must satisfy you

fully of defendant's guilt," and if they were so satisfied they should respond as their verdict: "Guilty as charged in the second count of the bill," otherwise to return a verdict of "not guilty."

There was a general verdict of guilty, and defendant appealed, assigning as errors—exception having been taken in apt time—the refusal to give the instructions asked, errors in the charge, and that judgment was entered upon the general verdict, which failed to designate on which count the defendant was guilty.

The other facts necessary to an understanding of the decision of the Court are stated in the opinion.

The Attorney General and *Mr. R. B. Peebles*, for the State.
No counsel for the defendant.

SHEPHERD, J. The first instruction prayed for by the defendant was properly declined. It was in evidence that on Saturday before Christmas the prosecutor's smoke-house was broken open and twenty-three pieces of meat were stolen; that on the previous Tuesday the prosecutor had killed five hogs, cut them up and placed the meat in his said smoke-house. It was also in evidence that the hogs belonged to his sister, Polly Parks, who had been living with him since the death of her husband, in June; that the hogs were brought to the prosecutor's in October, and "that she was to live out of" (them).

The prosecutor stated that he had not spoken of charging his sister with any part of the meat. He further testified that "he had the meat in his possession, keeping it"

These circumstances, we think, fully sustained his Honor's charge, to the effect that the prosecutor had such a special property in the meat as would sustain the indictment. Wharton's Crim. Law, §§ 1824, 1830; *State* v. *Hardison*, 75 N. C., 203; *Owens* v. *The State*, 6 Hump., 330; *State* v. *Jenkins*, 78 N. C., 478.

This latter case was cited by the defendant, but, we think, is authority against him. There the property was laid in the mere agent or servant of the railroad company, and the Court held that it was improperly charged. Judge READE thus tersely illustrates the principle: "A is the owner of a horse; B is the special owner, having hired or borrowed it, *or taken it to keep for a time* C grooms it, and keeps the stables and the key, but is a mere servant, and has no property at all; if the horse be stolen, the property may be laid to be either in A or B, but not in C, although he had the actual possession, and the key in his pocket."

In our case the prosecutor was not the mere agent or servant of the owner, but he had the meat in his possession, in his *own* smoke-house, keeping it, as the evidence tends to show, for his sister.

The other authority, *State* v. *Burgess*, 74 N. C., 272, cited upon this point, is equally inapplicable, the special property in that case being in three persons, and the indictment charging it to be only in one.

The second prayer, that the evidence being circumstantial, it must be as conclusive as if an "eye-witness" had testified to the fact, was also properly refused. *State* v. *Gee*, 92 N. C., 756. His Honor's charge upon the degree of proof was as favorable to the defendant as the law permits. There was a general verdict of guilty.

This exception is of no force. *State* v. *Jones*, 82 N. C., 685, which is directly in point.

We have carefully examined the charge of the Court, and we are unable to find any error.

No error. Affirmed.

STATE v. A. BRYANT et al.*

Forcible Entry, under The Code, § 1028—Essentials of Bill of Indictment under § 1028—Actual Possession—Attempted Entry.

1. The essential element of the offence of *forcible entry*, under *The Code*, § 1028, is, that the lands, &c., must be in the *actual* possession of him whose possession is charged to have been interfered with, and a bill is defective which fails to charge such a possession.
2. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises.
3. A charge in the indictment that the prosecutor was "seized in his demesne as of fee," &c., of land, is not a sufficient charge of possession under *The Code*, § 1028.
4. An ineffectual attempt to make such an entry as is forbidden by *The Code*, § 1028, is not punishable under that section, although it might constitute another offence.

CRIMINAL ACTION, tried before *Avery, J.*, at Spring Term, 1888, of NASH Superior Court.

The indictment charges that B. F. Amerson "was seized in his demesne as of fee of and in a certain tract of land, situate and being in the county of Nash, and State aforesaid, with the appurtenances thereof, and the said B. F. Amerson, being so seized thereof as aforesaid, A. Bryant, S. P. Gill and J. W. Murray, in the county of Nash and State aforesaid, afterwards, to-wit, on the fifteenth day of September, 1887, into the said land and appurtenances, with force and arms, with strong hand and with multitude of people, unlawfully and wilfully did make entry, contrary to the statute in such cases made and provided, and against the peace and dignity of the State."

---

*AVERY, J., did not sit in this case.

The defendants moved to quash the same on the ground that it did not charge "that the prosecutor was in possession when the entry was made." The Court allowed the motion, gave judgment for the defendants, and the Solicitor for the State, having excepted, appealed to this Court.

The Attorney General, for the State.
Messrs. Bunn & Battle, for the defendant.

MERRIMON, J. (after stating the case). An essential element of the offence of *forcible entry*, as defined by the statute (*The Code*, sec. 1028), is that the "lands and tenements, or term of years," must be not simply in the constructive, but in the actual possession of the person whose possession is charged to have been interfered with. It is the invasion of such actual possession with strong hand or a multitude of people, or a degree of force greater than a simple trespass, that tends to produce a breach of the peace, whether it actually does so or not, that makes up a constituent part of this offence. By actual possession is not meant that the person having it is continuously present in person on the land, but that he actually exercises authority and control over it, whether personally present or not—as by having it cultivated or used for some purpose by his family or servants.

Hence, it must be charged in the indictment, by apt words, that the person whose possession has been disturbed was in the possession of the land at the time of the entry; that he was expelled therefrom, &c. Otherwise, the offence would not be charged.

In the indictment in question, it is not charged that the prosecutor was in possession of the land, and that he was expelled therefrom, &c. It was, therefore, properly quashed. The offence was not sufficiently charged.

It was suggested on the argument, that the charge that the prosecutor was "seized," &c., sufficiently charged his

possession of the land. Such was not its purpose or effect. It charged the nature of the estate, the relation of the prosecutor to it, and embraced only such possession as was necessarily incident to it, but not necessarily actual possession—it might be constructive possession only. Besides, it is not charged that the defendant was in possession at the time of the entry, or that it was consummated by his expulsion therefrom. By *entry* is meant taking possession by forcible means, indicated by the statute, and the offence is not complete until such entry is made. An ineffectual attempt to make such entry might constitute another different offence. *State* v. *Mills*, 2 Dev., 420; *State* v. *Pollock*, 4 Ired., 305; *State* v. *Jacobs*, 94 N. C., 950; *State* v. *Walker*, 10 Ired., 234; *State* v. *Caldwell*, 2 Jones, 469; Bish. on Cr. Law, sec. 484; Ros. Cr. Ev., sec. 536; Whar. Pre. Indts. and Pleas, 492.

No error. Affirmed.

STATE v. DAVID BELL.

Where no exceptions are made below, and no error is apparent upon the record, the judgment will be affirmed.

The defendant was indicted for RAPE, and tried before *Boykin*, *J.*, at August Term, 1888, of the Superior Court of MADISON County, and, upon conviction and judgment, appealed to this Court.

Attorney General, for the State.
Mr. T. P. Devereux, for the defendant.

DAVIS, J. No errors are assigned in the case on appeal, or in the record, and, in return to a writ of *certiorari* from

this Court, it is certified that no exceptions whatever "were noted at any time before or after verdict, either to the admission or to the refusal to admit evidence, or to the charge of the Judge." Upon a careful examination of the record, no error appears, and the judgment must be affirmed.

No error. Affirmed.

STATE v. THOS. NICHOLS.

[See head-note to State *v.* Bell, *ante.*]

INDICTMENT for larceny, tried before *Clark, J.*, at Spring Term, 1889, of the Superior Court of UNION County.

There was a verdict of guilty, judgment, and appeal by the defendant.

Attorney General, for the State.

No counsel for the defendant.

DAVIS, J. There is no case on appeal, no assignment of error, and, upon inspection of the record, no error appears.

The judgment must be affirmed.

No error. Affirmed.

AN ADDRESS

ON THE

History of the Supreme Court,

DELIVERED IN THE

HALL OF THE HOUSE OF REPRESENTATIVES, FEBRUARY 4TH, 1889,
AT THE REQUEST OF THE MEMBERS OF THE COURT AND OF
THE BAR, IN COMMEMORATION OF THE FIRST OCCU-
PANCY BY THE COURT OF THE NEW SUPREME
COURT BUILDING, MARCH 5TH, 1888.

BY HON. KEMP P. BATTLE, LL. D.,
President of the University of North Carolina.

[PUBLISHED BY REQUEST OF THE COURT.]

INTRODUCTION.

By Hon. Thos. S. Kenan.

The people regard with favor every effort to preserve the history of the State, and of its separate civil and military departments of government. A notable illustration of this is the process of restoring the records of our Colonial times, which is now being conducted by the authority of an act of the Legislature, and under the wise and careful supervision of the Secretary of State.

Believing it to be desirable to present to the public, in an accessible form, the history of our Supreme Court, the members of the Bar, at a meeting held in this city not long since, invited the orator of this occasion to prepare an address to that end. His familiarity with the subject-matter, and his ability to deal with it, warrant me in saying that their selection was an admirable one, and that the discharge of the duty thus imposed will meet with entire approval. I take pleasure in presenting to you, ladies and gentlemen, the Hon. Kemp P. Battle, President of the University.

ADDRESS.

Mr. BATTLE said:

Gentlemen of the Supreme Court Bench and Bar, Ladies and Gentlemen: In tracing the history of the Supreme Court of North Carolina, we find that its origin is not the Act of 1818, which established it on its present basis, but that it properly begins with the first organized government in our State. I shall not attempt, however, to give in detail the successive struggles by which, from feeble beginnings, has been evolved this great tribunal, which controls so largely the peace and happiness of our people. I can attempt only a general review.

There are no records of any courts in the Provincial period under Governor Drummond, prior to the assumption of the government by the Lords Proprietors, and for some years after the grant of their charter. I have no doubt of there having been such, because English people, whenever and wherever they settled—in the forests of Germany before the dawn of history, in the lands wrested from the painted Britons, in the wilds of America and Australia, South Africa and India—have never failed, moved by divinely-implanted love of order, which has made them great, to have the germs of an executive, legislative and judicial power; but the records of those courts have been, probably, forever lost.

It might have been expected that there would have been inaugurated for the judicial system a copy—at least, a likeness—of the English system, but the grant of Carolina to the Lords Proprietors in 1663, enlarged in 1665, substituted for the king, as the fountain of all justice, eight sub-kings. They were vested with all the royalties, properties, jurisdiction and privileges of a county palatine, as large and ample

as the county palatine of Durham. The Bishop of Durham possessed in old times an *imperium in imperio*. He created barons, appointed judges, convoked Parliaments, levied taxes, coined money, granted pardons, erected corporations, and, although his powers had, to some extent, been curtailed by Edward I. and Henry VIII., many of them survived even to the reign of William IV. The Proprietors claimed, in fullest extent, the exercise of these prerogatives. After four years of provisional government, with entire confidence of success, they proceeded, in 1769, to put into operation the extraordinary scheme called the Fundamental Constitutions of Carolina, fondly described by them as the "Grand Model." There could not possibly be a more striking proof of the truth that all good governments are slow growths, the product of the struggles and compromises of intelligent and well-meaning men, than this abortive product of Locke's metaphysical brain. Locke was a learned philosopher, and most of the Lords Proprietors were men of large experience and ability in various fields of human activity, one of them, Shaftesbury, of extraordinary genius, but their attempt at government was so unsuited to the people for whom it was intended, that it met with their scorn and resistance, and the historian's ridicule.

These Fundamental Constitutions of Carolina were elaborately framed, on this principle, that the Proprietors had kingly authority, and were not subject to the Crown in the exercise of their government. The Supreme Courts created by that instrument were to be presided over by one of them in person or by deputy. Contrary to the statements of the historians of our State, this system was not entirely abrogated until the entire transfer of their jurisdictional rights to the Crown.

The Grand Model, which it would be an insult to Sir Thomas More to call utopian, sought to organize eight grand courts, one of supereminent greatness, consisting of the Proprietors themselves, presided over by the oldest, who was

styled the Palatine, another name for king, as the word is derived from palatium, a royal residence. Each of the other seven proprietors had likewise a court of which he was the chief judge, with six counsellors, as assistants, chosen in an elaborate manner, which I have not time to describe. It is interesting that these tribunals are copied after those which prevailed in the Roman empire. Their names and functions were:

The Chief Justice's Court, having charge of appeals in civil and criminal cases; the Constable's Court, having charge of military matters; the Admiral's Court, having charge of maritime affairs; the Treasurer's Court, having charge of matters relating to the revenue and finances; the High Steward's Court, having charge of commerce and trade, external and internal; the Chamberlain's Court, having charge of matters of heraldry and ceremony, and matrimonial matters. There was to be no appeal from any of these courts. A quorum was to be the Proprietor and three counsellors, but the Palatine Court could authorize special cases to be tried by any three.

There was likewise authorized a Chancellor's Court of one of the Proprietors and his six counsellors Its jurisdiction was terrific. It extended to all invasions of the law, of liberty, of conscience, and of the public peace under pretence of religion, and of the license of printing. It was evidently designed to have the terrible powers of the King and his Council, which, under the name of the "Star Chamber," did such bloody work in the effort to crush liberty in England.

The inferior courts were to be a county court of the sheriff and four justices, with general civil and criminal jurisdiction, and a precinct court of a steward and four justices, with criminal jurisdiction in cases other than capital, and in civil cases other than those concerning the nobility.

Trial by jury was authorized, but a majority carried the verdict.

Some curious provisions of a general nature were made: For example, it was provided, as among the Romans, that "it shall be a base and vile thing to plead for money or reward." "To avoid multiplicity of laws, which by degrees always change the right foundations of the original government," "all statutes were to be *ipso facto* null and void at the end of 100 years after their passage." Further, it was enacted that "since multiplicity of comments as well as of laws have great inconvenience and serve only to obscure and perplex, all manner of comments and expositions on any part of the Fundamental Constitutions or any part of the common or statute laws of Carolina are absolutely prohibited." But among these and other like senseless provisions was found one in advance of the age. While Claverhouse was dispersing conventicles and John Bunyan and other brave spirits were languishing in prison, no man could be persecuted for his mode of worshipping God in Carolina.

The Proprietors met at the Cockpit on October 21st, 1669, and organized themselves under the Grand Model. The aged George Monk, Duke of Albemarle, was by seniority the first Palatine, John, Lord Berkeley, Lord Lieutenant of Ireland, was chosen to be first Lord Chancellor, and Anthony Ashley Cooper, then Lord Ashley, afterwards Earl of Shaftesbury, was chosen the first Chief Justice of Carolina.

In the following year, 1670, Earl Clarendon being in banishment, and Sir Wm. Berkeley Governor in Virginia, six Proprietors met. The Duke of Albemarle had answered his final roll-call, and Lord Berkeley was Palatine in his stead. Each appointed his deputy, Berkeley choosing Samuel Stephens, who thereupon became the first Governor under the Constitution. Shaftesbury, the Chief Justice, gave his appointment to Mr. John Willoughby, who thus became the first, so far as is known, of the learned and dignified line of Chief Justices in our State. The other deputies, including Willoughby, became the Council, which, besides having other functions, became the upper house of Assembly of Albe-

marle. The Proprietors, regretting that they could not put the Grand Model completely in operation for want of landgraves and caciques, instructed the Governor and Council to come as near to it as possible. The Governor, with the consent of the Council, was authorized to establish courts and appoint judges.

Under these *express* instructions, to make as near approach to the Constitution as circumstances would admit, we find that the Governor and Council acted as the Court of Chancery, with almost arbitrary powers. They exercised the functions of an appellate court, not only as to questions of an equitable nature, but questions of common law and even fact. The Chief Justice, being a deputy of the Proprietors, was a member as of course, but not necessarily the Chancellor.

The supreme common law court was called the General Court, in which the Chief Justice presided, with an indefinite number of assistants, appointed by the Governor and Council. Sometimes the members of the Council were assistants. What powers these assistants had does not appear. They probably were merely advisers of the Chief Justice (who received his appointment from, and held at the will of, the Proprietors), as the assessors in Roman courts counselled the proctor. This seems clear from the fact that the early instructions to the Governor required that they shall be "able and judicious persons," and it was only about forty years afterwards, in 1724, that they shall be "learned in the law." Certainly in early days they were not, except in rare instances, lawyers. In 1728, Governor Burrington quarreled with the Chief Justice, and sought to neutralize his authority by claiming judicial powers for the assistants. The Assembly stoutly contended, through John Baptista Ashe and Cornelius Harnett, the elder, that the Chief Justice was supreme, and that assistants only had power to inform and advise, "exactly as masters in chancery informed and

advised the Chancellor." This view prevailed, although Burrington argues his point with ability. Again, I find when the Chief Justice was absent another was specially commissioned, the assistants not being allowed to hold the court. The assistants were allowed no salary or fees.

What we call "counties" were, until 1738, called "precincts," while a number of precincts constituted the larger jurisdictions of Albemarle and Bath counties. I do not find the County Courts, contemplated by the Fundamental Constitutions, ever had an existence. The Precinct Courts were established at once, and under the name, subsequently given, of Courts of Pleas and Quarter Sessions, continued until abolished by the Constitution of 1868.

It is not certain that the earliest Chief Justices were lawyers. The title, "Captain" John Willoughby, does not suggest Coke or Littleton. He seems to have been a man of force, as we have an accusation against him before the Lords Proprietors that he was a "person who runs himself in many errors and *præmunires* by his extra judicial and arbitrary proceedings in the courts." It is charged that he refused to grant an appeal to Thomas Eastchurch, saying that his courts "were the court of courts and jury of juries." As to the truth of the charge we must suspend judgment until the other side be heard from.

The earliest record of any General Court that we have, in 1694, at the house of Mr. Thomas White, shows that it was held by the whole Council, with Mr. John Durant as assistant. The Chief Justice was likewise the executive, Hon. Thomas Harvey, Esq., Deputy Governor, the Governor of Carolina being at Charleston. Whether he was a lawyer does not appear. The assistants were Hon. Francis Tomes, Benjamin Lakar, Major Samuel Swann, Daniel Akehurst, Secretary, Esq., Lord Deputies. The cases brought before the Court were escheats, laying out roads, attachments, actions in debt, assumpsit, detinue, trespass, *quare clausum fregit.* Criminal cases were also tried. They sat also as a court in chancery.

An instructive case, illustrating not only the court practices, but the business habits of the people, was that of Hopkins *v.* Wm. Spragg—Attachment.

The Provost Marshal, as the executive officer of the Court was called, returned attachment on six sheep, one pair of steelyards and one loom, one cow and yearling, one cow and calf, with whatever of estate of Spragg was in the hands of Christopher Butler; also £3 5 shillings in bonds of Lawrence Misell. The plaintiff declared that Spragg was indebted to him in 1,400 lbs of merchantable pork, agreed to be paid for; 14 sheep sold by plaintiff to defendant; that defendant was willing to surrender the 14 sheep in satisfaction, but Christopher Butler, by persuasion, prevented the same, and then, with intent to defraud said Hopkins, purchased all the defendant's estate; whereupon, Butler comes and defends the suit.

A jury is impaneled, who find for the plaintiff. The Court orders that the Marshal make payment to the plaintiff of the 1,400 lbs. of pork of the goods attached, being appraised according to law, with costs of suit, and the surplus, if any, to return to Butler.

Whereupon, Butler craves that further proceeding be stayed until the full hearing of the whole matter be had at the next Court of Chancery. Butler, and Mr. Stephen Manwaring as his surety for the appeal, give bond in the penal sum of 2,800 lbs. of pork

At the Court of Chancery, the same officers being present, with Col. Thomas Pollock, a Lord Deputy, and Col. Anthony Daws, as assistants, being added, it is recited that Christopher Butler, appearing and pretending title to the goods of Spragg, having obtained an injunction, has not filed any bill. It is decreed that the suit be dismissed. Evidently, Butler appealed for delay only. I find other appeals where there was no pretence of an equitable element.

I will give a criminal case—an indictment for murder—which shows the rudeness of the practice in that day. It is

charged that "Thos. Denham, Gent., with a certain weapon, commonly called or known by ye name of catt of nine tayles, feloniously and maliciously did strike, beat, wounded and killed" one Hudson, who, by reason of aforesaid mortal strokes and wounds, did depart this life.

RICHARD PLATES, *Att'y Gen'l.*

Jury find "guilty of manslaughter."

The record states that Thomas Denham, having been convicted of manslaughter and "saved by his Book" (a curious entry for pleading the benefit of the clergy), "ordered, that Thomas Denham be burnt in Browne of left thumb with a hott iron having y^e^ letter M, and pay all costs, and upon his petition, the court in chancery doth reprieve said sentence until her Majesty's pleasure be further known."

It seems here that the Governor and Council, sitting as a Court of Chancery, granted the reprieve. The power of reprieve was originally granted to the "Governor and Council." It is likely that the same body acted in an executive capacity at one moment, and, without leaving their seats, resolved itself into a Court of Chancery. The functions of the two were therefore sometimes confounded Long afterwards we find that the Governor and Council prescribed days for holding court, generally the week after the session of the General Court.

It will be noticed that the reprieve was "until her Majesty's pleasure be known." This seems inconsistent with the claim of the Lords Proprietors to absolute rule, "*jura regalia*," in Carolina. History shows that there was great discontent with the practical independence of the Crown granted by the charters of Charles II. *Quo warrantos* were sometimes threatened for annulment of the grants, and the Proprietors found it necessary to make some concessions of their princely claims long before they sold their rights to the Crown. At one time the General Court refused to grant an appeal to the Privy Council, but afterwards it was deemed

best to allow it, though so grudgingly that they refused to stay execution pending the appeal.

The oath required of the judges was short and to the point: "You shall doe equall Right to y^e^ poore and rich after your cunning, witt & Power. You shall not be councell of any quarrell hanging before you."

We have no records of the General Court during the troublesome times of the so-called Cary Rebellion and the Tuscarora War. The record of one held in 1713, for the Province of North Carolina, is printed in the Colonial Records. This is like our modern courts. The Deputy Governor and his Council, with one or two assistants, are no longer the judges. In their place we find the Hon. Christo. Gale, Chief Justice, and Thos. Miller, Capt. John Pottiver and Anthony Hatch, Assistant Justices. Gale was a lawyer, though Urmstone, the missionary (not a good witness, however, as a rule), says that he was in England only a lawyer's clerk. The others were plain justices of the peace. At what time these changes occurred does not appear. This constitution of the court continued for many years.

The pleadings are more accurately drawn, though the spelling does not improve. For example, we have "enorminous" for "enormous," "abrobrious" for "opprobrious," "dispositions" for "depositions." Lawyers are more numerous. The principal are Edward Moseley, Thos. Snoden, and Edward Bonwich, who is her Majesty's Attorney General. The place of meeting is Captain John Hecklefield's, in Little River. The Assistant Justices are sometimes styled "Associates." Instead of appealing to the Courts of Chancery to set aside judgments, motions are made before the Court itself for arrest of judgment. The points made by Edward Moseley in *Cary* v. *Took* would do credit to a modern lawyer with his unlimited access to books.

It is to be remarked in passing that the Colonial Records show that the act of the General Assembly, expressly declaring that the common law is and shall be in force in this

government, except the " part of the practice in the issuing out and return of writs and proceedings in the Court of Westminster," &c., which Hawks and others say was first passed in 1715, was certainly passed as early as 1711.

Christopher Gale is the most imposing figure in the early judiciary. His portrait, with his dignified countenance and flowing wig, shows judicial serenity equal to his contemporaries in England. The missionary, Urmstone, whose grumbling spirit and vituperative pen destroy his credibility, cannot help admitting that he had gained great esteem, and was regarded as an oracle. Everard and Burrington praise him at one time, and when he opposes their schemes violently denounce him, as they did all other officers not agreeing with them. But the vestrymen of his church indorse his piety, the members of the lower house of the Assembly his learning and integrity, and the Lords Proprietors give him their support. My opinion inclines to Gale.

Whoever has held the great office of Chief Justice deserves at least that his name shall be recorded. I therefore state that Tobias Knight, the same who was accused of complicity with the pirate Teach, or Thache (pronounced Tack), known as Blackbeard, who was, however, acquitted, was in place of Gale, who vacated his office by going to England. Then came Frederick Jones, who, I am grieved to say, unjustly detained money, paid to him in lieu of bail, which his executors were forced to disgorge. Then came Gale again, during whose second term the court was for the first time held in a court-house, in Edenton, formerly Queen Ann's Creek. In 1724 the terrible Burrington assumed the power of ejecting him and appointing Thomas Pollock, but the indignant Proprietors quickly reversed his action, ejecting Burrington and installing Sir Richard Everard as his successor. At the Court in 1726 ten assistants sustained the Chief Justice, while three indictments were found against the late Governor for trespass, assault, misdemeanor and breach of the peace, which the accused contemptuously ignored until after

the second term; the Court, in despair of enforcing its authority, ordered *nolle prosequis* to be entered. It was high time for the Lords Proprietors to surrender a trust which they had so shamefully mismanaged.

In 1728 the Proprietors transferred to the Crown the jurisdiction over all the territory covered by the charters of 1663 and 1665, and seven-eighths of the title to the land, Earl Granville retaining his interest in the soil, which was in 1744 conveyed to him in severalty. The jurisdiction was not formally assumed until 1731, when Burrington, the first royal Governor, replaced Everard. There was no change, therefore, in the court system until the latter date, Gale continuing to be Chief Justice, and having constantly stormy disputes with the Governor. He was superseded by William Smith, who is described as having been educated at one of the English universities, and having been a barrister at law for two years. The royal instructions to the Governor show a desire to have a better government. The Governor was forbidden to displace a Judge, without good cause reported to the King or the Commissioners for Trade and Plantations. Justice was ordered to be dispensed without delay or partiality, and the privilege of the writ of *habeas corpus* was enjoined Appeals from the Court to the Governor and Council were allowed in cases of over £100 value, and thence to the Privy Council in cases over £300.

Burrington, in an official report, gives a very intelligent account of the court laws of his day. The Chief Justice was paid a salary and fees for forty-one several acts, the scale of which may be estimated from issuing a writ being 3 shillings, filing a declaration or plea 2 shillings and 6d., &c. The Clerk's fees were about the same as those of his chief. The fees were payable in Proclamation money, or in certain commodities at prescribed rates, *e. g.*, tobacco at 11 shillings per 100 lbs, corn at 2 shillings per bushel, wheat at 4 shillings per bushel. The Clerk, Wm. Badham, reports that in 1772 the salary of the Chief Justice was £60 per annum, and

fees about £100. The latter rose to £500. Attorney General Little in 1731 estimates his own fees at £100, and the Chief Justice's income at £500 or £600, of which £60 was salary. The depreciation in Proclamation money varied very much at this time—according to Burrington the pound sterling being eight to one, but according to the Assembly only five to one.

Governor Burrington's friendship with Chief Justice Smith was of short continuance. We soon find the latter proceeding to England bearing complaints of the Governor's tyrannical and overbearing conduct, one witness swearing that he had in the presence of the Court ordered the marshal to arrest and imprison him. The Governor endeavored to break the force of his attack by writing to the Board of Trade that Smith was "the jest and scorn of the men who perverted him," "a silly, rash boy, a busy fool and an egregious sot," "ungrateful, perfidious scoundrel, and as much wanting in truth as understanding."

These are hard words to be said of one presiding in the highest court of the land, but the Chief Justice repaid the Governor with such compounded interest that Gabriel Johnston was soon seated in the executive chair, and Smith resumed his seat on the bench.

During Smith's absence in England, Burrington appointed John Palin as his successor, and on his resignation from ill health, Wm. Little, Gale's son-in-law, who died in two years and was succeeded by Daniel Hanmer, who in turn was soon ousted by the triumphant Smith. Those were sad times. In addition to the outrageous violence of the Governor, the lower house of the Assembly unanimously voted that Chief Justice Little was guilty of oppression and extortion, while Chief Justice Hanmer was imprisoned for perjury, which his friends charged was procured by the vindictive malice of Chief Justice Smith. Sixteen members of the Assembly charged Smith with grievous exactions and extortions and offered to prove the charges if time should be given for pro-

curement of the witnesses. And still people prate of the glorious old time! Even the old song, which tells of the miller's stealing corn and being drowned in his dam, and the weaver's expiating the theft of yarn by being hung in his web, and of the little tailor who went down below gripping tightly the purloined broadcloth under his arm, neither, however, meeting justice at the hands of the law—even that old song, bearing most cogent testimony of wide-spread corruption, has the effrontery to begin:

> "In the *good old Colony times*,
> When we were under the King!"

We now approach an important epoch in the history of our Colonial law. For many years the judges had been endeavoring to mould our judicial system after the English pattern—a court in bank, where all the pleadings were made up, sending out its judges periodically for trials of questions of fact in the neighborhood where the parties and witnesses reside. The first circuit ever attempted was Edenton and Newton, in Hyde County. The increase of population on the Cape Fear, the Neuse and the Tar, made it proper to take steps to accommodate those localities. Governor Johnston and his able Council were leading spirits, determined, if possible, to introduce the English system more fully, with Newbern as the new Westminster and to adopt that town as the capital of the Province.

A formidable obstacle was in the way of this improvement. The Lords Proprietors had granted each of the six precincts of old Albemarle County, Currituck, Pasquotank, Perquimans, Bertie, and Tyrrell, five members of the Assembly, while the others had only two. Such inequality may seem atrocious to us, but there were scores of worse inequalities among the boroughs sending members to the British House of Commons; and we are familiar with diminutive Delaware having the same political power in the Federal

Senate as her big sister New York, with population thirty-five times greater. Certainly the inhabitants of those counties clung tenaciously, without sense of shame, to their privilege; and their thirty members, being a majority of the House, voted solidly against transferring the seat of government from Edenton.*

Governor Johnston determined to carry his point by surprise. He prorogued the Assembly, appointing the new place, Wilmington, as far as possible from the Albemarle, and the time, the latter part of November, when the swamps and low grounds were usually deep in water, and the Albemarle members, nearly all planters, were engaged in driving their hogs to market or curing their slaughtered carcasses for future use. He reckoned correctly that they would be slow in making the long and toilsome journey, and incurring danger of financial ruin by leaving their farms at a most critical period. By his advice, the southern members, taking advantage of their absence at the opening of the term, resolved that, by analogy to the British House of Commons, in which forty members constitute a quorum for transacting business, fourteen and the Speaker should be a quorum, and proceeded to reduce the representation of those counties to two each, fixed the seat of government at Newbern and passed the court bill of 1746. They thus added one more to the instances of good measures, like the union of England and Scotland, and the *habeas corpus* act, passed by unworthy means.

By virtue of this act Newbern took the place of Westminster. All writs, plaints, and process were to be commenced in the Supreme or General Court then, and all the pleadings and proceedings thereon were to be carried on until the case was at issue, and then the court issued out writs of *nisi prius* and subpœnas for witnesses to attend at the proper places.

These *nisi prius* courts were to be held by the Chief Justice twice a year at Edenton, in the Northern circuit, at Wil-

mington in the Southern circuit, and in the court-house in Edgecombe in the Western circuit.

The supreme and principal Court of Pleas for the Province was to be held twice a year in Newbern, and was to be called by the old name, the General Court. The Court consisted of the Chief Justice, appointed by the Crown, and three Associates to be appointed by the Governor, the Associates to have the powers of Associates in England, and to hold the Court in cases of the sickness or disability of the Chief Justice, or when he was a party.

The criminal cases were to be tried in courts of Oyer and Terminer and General Jail Delivery, to be held by the Chief Justice, or some person specially commissioned.

The Courts of Chancery were to be held in Newbern on the second Tuesdays after the General Courts.

The County Courts were to have cognizance of all cases above 40 shillings, and not exceeding £20 Proclamation money, of all petty larcenies and misdemeanors, with right of appeal to the General Court.

This act was a great improvement on the old system. It contains many provisions of the court acts of North Carolina of our day. I conjecture it was drawn by Moseley, then Chief Justice, or by him and Samuel Swann, both of whom were able and experienced lawyers. They, with Enoch Hall and Thomas Barker, were appointed the same year to revise and publish the Acts of Assembly in force. Hall and Barker seem not to have acted, and Moseley died in 1749, so the work is called Swann's Revisal, or "Yellow Jacket."

The admirers of Archibald MacLain claim for him the authorship of the much-lauded court law of 1777, which claim is, I think, successfully disputed by the admirers of James Iredell the elder in his behalf. The codifiers of the Revised Statutes of 1836 give the credit to the unknown author of the court law of 1767, but an inspection of the Acts of 1746 shows that its authors should have equal praise.

The acts met with vehement opposition at home and in England. The Board of Trade submitted the question as to their loyalty to the eminent law officers, both afterwards conspicuously adorning the Chief Justiceship of the King's Bench of England, Sir Dudley Ryder, Attorney General, and Wm. Mansfield, afterwards Lord Mansfield, Solicitor General. Their opinion was that the acts were passed "by management, precipitation and surprise, when very few members were present, and are of such a nature and tendency and such an effect and operation that the Governor, by his instructions, ought not to have assented to them, tho' they had passed deliberately in a full Assembly."

Whereupon, the agent for North Carolina craved leave to appear by counsel, Mr. Hume Campbell and Solicitor Sharpe. Their argument was ably replied to by Mr. Joddrell, counsel for the Albemarle counties.

This argument was had in 1751, five years after the passage of the act. Three years after this the Board of Trade made its decision against the acts, on the ground that they encroached on the King's prerogative. In consequence of this unaccountable and criminal neglect during all the years from 1746 to 1754, the six counties regarded not only these, but all other acts of Assembly, as illegal, and refused to recognize them in any way, because passed by an unlawful Assembly. Juries refused to attend the courts in Edenton, and there was practically no recognized government in the Albemarle country. Bishop Spangenberg, the Moravian, reports that "perfect anarchy prevailed. As a result, crimes are of frequent occurrence." This is not an unusual example of the misgovernment of North Carolina during the Colonial period.

The Assemblies under Governor Dobbs showed determined purpose to secure administration of the law, intelligent and honest. To secure independence they enacted that the Associate Justices should hold office during good behavior, which had been the rule in England since the Act of Set-

tlement, in 1701. To secure legal ability and interest in the Province, they enacted that no one should be an Associate Justice unless he should have been an outer barrister of five year's standing in England, or an attorney of seven years' practice in this or an adjoining Colony, and also have been a resident here for one year.

This excellent law was vehemently objected to by the Crown officers of the Board of Trade, and was repeatedly disapproved by the Crown. The Assembly stood firm, so that occasionally there was an interval of anarchy between the notice of the disapproval and the passage of the new law. Riotous assemblies were had, jails broken into, malefactors set at large, and violence and robbery were frequent and unpunished. Attorney General Robert Jones piteously complains that the rioters of Granville had notified him that they intended to petition the Court to silence him, and if they refused, to pull his nose.

The flimsy reasons given for the disapproval of these acts bring out clearly the strength of the position taken by the Assembly. They were:

1. That the qualifications prescribed for the Associates were an unconstitutional restraint on the power of the Governor, who held his power of appointment under the Great Seal.

2. That they practically prevented any one from England being appointed an Associate Judge.

3. That it was manifestly improper that the Associates should hold during good behavior, while the Chief Justice held at the pleasure of the Crown.

4. That the acts create the offices of Associate Justices, leaving the Governor only the form and name of commissioning them.

5. That it delegates to them, in the absence of the Chief Justice, the whole right of jurisdiction, which right can only be delegated by the Crown.

6. That by the extending the circuit over 1,900 miles a year, a disability of attendance is created.

7. That the Chief Justice in distant and desert places will be deprived of recourse to books to enable him to make a right decision.

In 1760, Governor Dobbs was moved, by the urgency of the Assembly and prevalence of anarchy, with the approval of Chief Justice Berry, and the Attorney General Childs, who had given a different opinion when in England, to sign a court law substantially the same as that disapproved by the Crown. For this he was severely censured by the King and Council, and the laws were disallowed; wherefore, in 1762, the Assembly receded from the obnoxious provisions. "A Supreme Court of Justice" was established in the district of Edenton, Newbern, Wilmington and Halifax, to be composed of the Chief Justice and one Associate, and in the Salisbury district of the Chief Justice and an assistant Judge.

In 1767, a new and more elaborate court system was adopted for five years. The Province was divided into five judicial districts, Hillsboro being added to those heretofore mentioned. In each was a court held by the Chief Justice and two Associates, the latter appointed by the Governor and allowed £500 a year, for payment of which a special tax on each wheel of a pleasure carriage, and on law suits, was laid. Martin Howard was Chief Justice, and Richard Henderson and Maurice Moore were appointed Associate Justices.

This system was an essential departure from the English system. Instead of the judges trying questions of facts only in the districts, leaving the questions of law to be heard before all the judges sitting in bank at Newbern, all the members of the Court went to the court-house of each district and there heard both questions of fact and questions of law. The *Nisi Prius* Court and the Appellate Court were held in the same town by the same judges, and during the

same term. A great defect was, that one Judge, in the absence of the others, had all the powers of the Court.

The salary of the Chief Justice was £26, and of the Attorney General £16, the Associate Justices £41 13s. 4d., Proclamation money, for each court.

The act was not renewed. After the expiration of the five years' limit, the Governor and Council insisted on exempting from the attachment laws the estate of those who had never resided in the Province, and to confine them to cases of those debtors who had absconded from the Province with the intent to avoid payment of their debts. The Lower House unanimously resolved that the right to attach the estates of foreigners had long been exercised by the inhabitants of the Province; that it had been found greatly beneficial to its trade and commerce, and the security of the property of inhabitants, and that they could not, by any public act of theirs, relinquish this right, abandoning the interest of their constituents, and the peace and happiness of the Province. The Governor urged them to provide compensation, at least for those appointed by him especially to hold courts of Oyer and Terminer and General Jail Delivery, but they firmly declined. They claimed that such commissions could not be valid without the aid of the Legislature; that calamitous as the circumstances of a people might be, from the interruption both of criminal and civil jurisprudence, the House judged the misery of such a situation vanished in comparison with a mode of redress exercised by courts unconstitutionally formed. The various arguments of the Assembly on this question show ability and a fixed determination to secure for themselves the untrammeled right to pass laws suitable to the circumstances of the Province.

In consequence of this disagreement, our Province was without higher courts from 6th March, 1773, to December 24, 1777, which period is excepted out of the statute of limitations by the court law of 1777. Governor Martin attempted to

inaugurate criminal courts by special commission, under the royal prerogative, Samuel Cornell being, *pro hoc vice*, appointed Chief Justice, but such strong exceptions were made to the commissions that the scheme was not pressed. There is abundant evidence of the crime and turbulence resulting from the suspension of the courts. It was not long, however, for in August, 1775, the State Congress at Hillsboro adopted a provisional government in preparation for the war of independence, and the functions of the judiciary were exercised by the stern hand of the Committees of Safety.

It only remains, before leaving the Colonial history of the Supreme Court, to give a list of the Chief Justices after Wm. Smith, who left for England in 1740. John Montgomery received the temporary appointment, which, on Smith's death, three years later, was made permanent. He was succeeded in 1744 by Edward Moseley, a man of great ability, who for forty-four years preceding his death, in 1749, with rare ability and weight of character, was ever foremost in public and in private life, in working for the material interest of the Colony, in battling for the rights of the people, in courageously withstanding the tyranny of the executive. After Moseley was Enoch Hall, whose good character receives the praise of Governor Dobbs, while his knowledge of the law receives his depreciation. On his visiting England in 1750, Eleazer Allen and James Hazell held the office successively. I know nothing of Allen. McCullock, the elder, estimates Hazell as a creature of Johnston, not bred to the law and without the least knowledge therein. Peter Henly was next in office, a man of uprightness, according to the Lower House of Assembly. On his death in 1758, James Hazell was again the *locum tenens*, until the arrival of Charles Berry. He seems to have been a fair and upright Judge until he came to a tragic end in 1766, by suicide in a fit of temporary insanity, it is said, brought on by brooding over the displeasure of Tryon because the slayer of an English officer in a duel was not convicted in his court.

Martin Howard, the next Chief Justice, was a firm supporter of the royal prerogative. For his advocacy of the Stamp Act, while a Judge in Rhode Island, his home was burnt and he was forced to flee for his life. Unusual obloquy has been heaped upon his name; but as he was allowed to reside on his plantation in Craven County, where he claimed to have made two blades of grass grow where one grew before, unmolested, until the middle of September, 1777, and was on friendly terms with Judge Iredell, I surmise that much of the odium against him must be attributed to party feeling. His legal reputation was high.

Judges Moore and Henderson espoused the cause of the Colonies, and the former was active as a legislator in Revolutionary times. Moore seems to have been an able lawyer. Henderson turned his attention to land speculation, and certainly had ambitious views, as history shows. A son of the former, Alfred Moore, became a Judge of the Supreme Court of the United States, and a son of the latter, Chief Justice of the Supreme Court of our own State.

The Constitution of the free State of North Carolina was adopted on the 18th of December, 1776. The framers had no conception of any system in which the judges of the supreme or appellate court should not themselves sit in the trial of causes. There is no provision in it regarding a Superior Court Judge. It is the legislative, executive and supreme judicial power that are to be kept separate. The General Assembly is to elect Judges of the Supreme Court of law and equity and Judges of the Admiralty. It is the Judges of the Supreme Court who are to have adequate salaries. It is certain that the Constitution contemplated that the Supreme and Superior Court Judges should be the same persons, as in Colonial days and as in England.

Under the Colonial government, the Chief Justice was the highest judicial power; yet he was a member of the Council, and therefore an influential part of the executive depart-

ment. As the Council was the upper house of the General Assembly, he was likewise an influential part of the Legislature. The Governor not only could disapprove acts and dissolve and prorogue the Assembly, but had large weight in the appointment and control of the Council, and thus had power in the Legislature. Moreover, being a member of, and presiding over, the Court of Chancery, he was an important factor in the judicial department. In fact, complaint was made against Governor Johnston that he acted as Chancellor when the court was not in session. Hence, we find the prohibition of the intermingling of the three departments of our government inserted in the Declaration of Rights. But the framers of the Constitution had had so much experience of the arbitrary conduct of the Governor and Judges that they made the executive and judicial branches almost entirely dependent on the General Assembly, the annually-elected agents of the people. I will not stop to show this as to the Governor. The statement is abundantly evident as to the judges. They held office during good behavior, but they could be removed by repeal of the law authorizing the court. They were to have adequate salaries, but the Assembly had the sole decision as to what was adequate. The Assembly, without the intervention of a grand jury, could prosecute them by impeachment for alleged maladministration or corruption.

The Constitution of 1835 remedied at least two of these defects. By the amendments then adopted, the salaries of the judges could not be diminished during their continuance in office, and the Senate only could try impeachments, two-thirds being required for conviction. The judges were still removable by repeal of the law under which their offices were held. It was not until 1868 that the Supreme Court was made a part of the Constitution, so as to secure entire independence. It is a strong proof of the firmness and integrity of our judges since 1777, as well as the conservatism of our people, that those officers never hesitated to do their duty,

even when in opposition to the will of the Assembly, and the people sustained them. They have repeatedly declared null laws framed by the body which could have docked their salaries and even abolished their offices. They have not hesitated to incur temporary unpopularity in defence of principles of lasting value.

On November 15, 1777, the new court law was adopted. It is so nearly a copy of the act of 1767 as to suggest the probability of having been drawn by the same lawyer. The term "Superior Court" was used when it was manifestly proper to use the constitutional term "Supreme Court," which would not have been a misnomer, as it had supreme jurisdiction. In another section the draftsman forgot to omit the words "or commander-in-chief" after the word Governor, as should have been done. In the oath are phrases copied from the old oath, which are out of place in a government where the judges are in no danger from the arbitrary action of the executive.

The few changes were undoubtedly for the better. Two judges were required to declare questions of law, or demurrers, cases agreed, special verdicts, bills of exception to evidence, and motions in arrest of judgment. The licensing of new attorneys was taken from the Governor and given to at least two judges. The salary was increased to £100 for each term attended, or £50 in case of non-attendance from necessity, and no fees were allowed.

It shows the continued domination of English ideas that the establishment of courts of equity was delayed for five years. As the departments of government were obliged, under the Constitution, to be kept separate, the General Assembly could not, even if it desired, have conferred equitable jurisdiction on the Governor and Council, as in Colonial days, nor was the creation of new offices in accordance with their views. The expedient of making the same officer a judge at one hour, of law, and at another, of equity, was not obvious to the legislative mind until 1782.

The act of 1777 followed that of 1776 in dividing the State into six districts, the Courts for which were to be held at Wilmington, Newbern, Edenton, Hillsboro, Halifax and Salisbury. In 1782 the district of Morgan was added, and in 1787 that of Fayetteville, making eight in all. The Attorney General, as in Colonial times, attended all the Courts in behalf of the State. The people of the counties of New Hanover, Onslow, Bladen, Duplin and Brunswick attended Court in Wilmington; of the counties of Craven, Carteret, Beaufort, Johnston, Hyde, Dobbs and Pitt, in Newbern; of the counties of Chowan, Perquimans, Pasquotank, Currituck, Bertie, Tyrrell, Hertford and Camden, in Edenton; of the counties of Halifax, Northampton, Edgecombe, Bute, Martin and Nash, in Halifax; of Orange, Granville, Wake, Chatham and Caswell, in Hillsboro; of the counties of Rowan, Anson, Mecklenburg, Guilford, Surry, and Montgomery, in Salisbury; of the counties of Burke, Wilkes, Rutherford, Washington, Sullivan and Lincoln (Washington and Sullivan being in what is now Tennessee), in Morgan, now called Morganton; the people of the counties of Richmond, Cumberland, Sampson, Union and Robeson, in Fayetteville.

A full Court consisted of all three Judges and Attorney General. One Judge could hold the Court, but it required, as before stated, two Judges to sit as an appellate or Supreme Court. For trial of criminals beyond "the extensive mountains that lie desolate between the inhabited parts of Washington (in Tennessee) and the inhabited parts of Burke," it was provided by act of 1782 that one of the Judges, and "some other gentleman commissioned for the purpose," should hold Court at the county seat of Washington (Jonesboro), for that county and Sullivan, the Judges and Attorney General to have two-thirds of the allowance given for holding the other Courts.

The first Judges elected were Samuel Ashe, of New Hanover; Samuel Spencer, of Anson, and James Iredell, of

Chowan. After riding one circuit Iredell resigned his seat, and John Williams, of Granville, took his place in 1777. Iredell was a very able lawyer, of a judicial temper, afterward fully demonstrated on the Supreme Court Bench of the United States, to which he was appointed by Washington. Ashe held his office until 1795, when he was elected Governor; Spencer until his death in 1794; Williams until his death in 1799. For thirteen years, at a most critical period of our history, during the throes of the Revolutionary War, during the chaotic days of the nerveless confederacy succeeding, when the exhausted people, staggering under broken fortunes and a worthless currency, were bringing into order the State whose liberties they had won, during the stormy discussions preceding the adoption of the Constitution, which many thought would bring back the galling tyranny of Tryon and Martin—during all these times of despondency and poverty, of dissension and furious party spirit, these three were the entire judiciary—Judges at *nisi prius* and Judges in bank, Judges of law and Judges of equity, Judges of the Superior and Judges of the Supreme Court.

The calm judicial demeanor, the superiority to the passions which tear the breast and influence the actions of clients and their lawyers, was not in those days, nor long afterwards, expected of the Bench. Fierce sarcasms, like those of Ellenborough and Chase, and foul curses, like those of Thurlow, could be paralleled at many courts in England and America. It was not until 1796, that a Judge in North Carolina was forbidden to express to the jury his opinion of the facts, and this practice inevitably provokes the wrath of lawyers. It is not wonderful that our judges had the faults of their day. Moreover, neither one of the judges had properly much training in the law before his election to the Bench. Ashe was a lawyer, but the character of the practice and the turbulence of the timas did not allow much devotion to his profession. Spencer had been Clerk of Anson Court and certainly had been a

lawyer only a limited time, if at all. Williams had been a carpenter, and though possessed of good judgment and highest character, was unlettered. The troublous times of the Revolution afforded little opportunity for the Judges to perfect themselves for their judicial duties. Having witnessed with their own eyes the despotic conduct of Governors and other royalist officers, their feelings were warmly enlisted against the establishment of a strong general government. Some of the lawyers who practiced before them were well read in literary as well as legal lore, ardent Federalists, and at least two of the most prominent, Maclaine and Hay, were high tempered, and when irritated, had tongues sharp as a scorpion's sting.

The estimate placed by these gentlemen on the Judges, is extremely unfavorable. Maclaine and Hay spoke of them with bitter contempt. Davis refused the offer of the District Judgeship of the United States, because of the paltry salary, though he was "anxious to escape from the d—d Judges." Hooper narrates the following, which I quote as showing our improvement in judicial dignity:

"Court went on in the usual dilatory mode. Great threats of dispatch accomplished in the usual way. Much conversation from Germanicus (Spencer), on the bench; his vanity has become insufferable, and is accompanied with overbearing insolence. Maclaine and he had a terrible 'fracas.' Germanicus with those strong intuitive powers with which he is inspired, took up Maclaine's defence in an ejectment and run away with it before it was opened. Maclaine expostulated, scolded, stormed, called names, abandoned the case. I prevailed, Spencer made condescensions, hostilities ceased and peace was restored."

Hay made before the Assembly of 1785, accusations against the Judges for the following offences. I copy verbatim from a letter of Hooper:

"1. High fines and shameful appropriations of them.

"2. Admitting new and illegal prosecution (depreciations, &c).

"3. Banishment of Brice and McNeill.

"4. Dispensing with laws (the Newbern case).

"5. Negligence of their duty and delay of business.

"6. Ill behavior to Mr. Hay at Wilmington."

As to these charges, the Attorney General (Moore) said that some of them were quite new to him. Judge Ashe refused to notice these at all, and said that "he has clear hands and a pure heart."

Hooper says Hay "boils with as much fury against the judges as Saul against the Christians." He adds that "the ridiculous pursuit of Hay's ended as he expected. It was conceived in spleen and conducted with such headstrong passion that after the charges were made evidence was wanting to upset them." On the whole, we must conclude that the judges were not as learned or as dignified as our standards require, but they were by no means as deficient as the critical Federalist lawyers painted them. There were bad manners on both sides. That Spencer had talent and influence is proved by the continued hold he retained on the affections of the people of the State, especially of his intelligent constituents of Anson. It is proved by the evident respect shown to him and his opinions by such men as Iredell and Johnston and Davie in the Constitutional Convention of 1788, as well as by his strong arguments against certain clauses of the Constitution. I regret to say that tradition sustains the charge against his private character as to his anticipating, in his mode of living, the practices of Brigham Young, but I find no tangible charge of corruption in office. I am fortunate in being able to give a contemporary newspaper account of his death, the most peculiar in all the history of the taking off of great men:

"In extreme old age he was placed in a chair in his yard under a shady tree. A red cap protected his bald pate from the flies. The humming of bees and the balmy sunshine

brought a gentle slumber upon him and caused him to nod. A large turkey gobbler mistook his nod for a challenge to fight, and smote with heavy spur the old man's temple. Suddenly awakened by the blow and resounding flaps of hostile wings, the venerable judge lost his balance, and fell heavily to the ground and was dead." The inhabitants of the valley of the Pee Dee will tell you that the gobbler was his murderer. My newspaper states that he was killed by the shock of the fall. Let each of you make his own deduction, according to his views of *potentia proxima* and *potentia remotissima*. The only judge cognizant of the facts died before rendering a decision.

Samuel Ashe was undoubtedly a man of force, strong in intellect and will, though his taste did not lie in hard study of the law. He had the confidence of his contemporaries during his nineteen years of judicial service, and after his elevation to the executive chair. The wrangling with the bar and between the judges, so often imputed to Spencer and Williams, were not imputed to him, though the charge that his hatred of Tories swerved him from perfect impartiality, in cases in which they were parties, may probably be true. Williams was in all likelihood the most unlearned of the three, but he has left behind him, especially among his neighbors in Granville in and around the village named in his honor, an unspotted reputation for integrity and charitable conduct.

These, our earliest judges, are entitled to the eminent distinction of contesting with Rhode Island the claim of being the first in the United States to decide that the courts have the power and duty to declare an act of the Legislature, which in their opinion is unconstitutional, to be null and void. The doctrine is so familiar to us, so universally acquiesced in, that it is difficult for us to realize that when it was first mooted, the judges who had the courage to declare it were fiercely denounced as usurpers of power. Speight, afterwards Governor, voiced a common notion when he declared that

"the State was subject to three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman Triumvirate and equally insufferable." In Rhode Island the Legislature refused to re elect judges who decided an act contrary to their charter to be void. In Ohio, in 1807, judges who had made a similar decision were impeached, and a majority, but not two-thirds, voted to convict them. As I have mentioned, the action of the court was the foundation of one of the charges brought by Hay. He accused them with dispensing with a law—the "Newbern case." This was the case of *Bayard* v. *Singleton*, in ejectment, which our judges had the nerve, as early as May Term, 1786, to refuse to dismiss, as ordered by act of Assembly, on affidavit of the defendant that he bought the land in suit under confiscation sale. The judges were sustained eventually by public opinion. Iredell wrote a strong pamplet vindicating the power of the judiciary. New York follows with a similar decision in 1791; South Carolina in 1792; Maryland in 1802; the Supreme Court of the United States, in *Marbury* v. *Madison*, in 1801.

The Constitution contemplates that, as in England, the office of Attorney General should be of great importance. In his mode of election, and in the mandate as to adequate salaries, he is classed with the Governor and Supreme Judges. It is very doubtful whether the act of 1790, which provided for a Solicitor General for one-half of the counties, and that of 1806, which reduced the Attorney General to little better than a Solicitor for the metropolitan circuit, were not in this respect unconstitutional. They were certainly extra-constitutional. The early Attorneys General were equal if not superior to the Judges as lawyers. Waightstill Avery, who first held the office, was an accomplished and able man, the worthy ancestor of one of our present judges. On his resignation from ill-health in 1779, James Iredell succeeded and served until 1782. His successor, Alfred Moore, resigned in 1790 in disgust at being required to sur-

render to Edward Jones, the Solicitor General, half of the honors and emoluments of his office. The office lost none of its dignity by next devolving on the greatest criminal lawyer of that day, John Haywood.

We now resume the legislative history of the Supreme Court:

In 1790 the eight judicial districts were separated into ridings, the districts of Halifax, Edenton, Newbern and Wilmington constituting the Eastern, and those of Morganton, Salisbury, Fayetteville and Hillsborough constituting the Western riding. An additional Judge, Spruce McKay, whose advent was hailed by the lawyers deservedly with joy, was elected. Two judges in rotation, with the Attorney or Solicitor General, were assigned to hold the courts in each riding. This law was, as to the appellate functions of the court, worse than the old. The uniformity secured by having the same Judges for all the State was lost, and the miserable spectacle of diverse decisions by different supreme tribunals of the same question was not only possible but frequent. Delays from difference of opinions were unavoidable. For example, take the case of *Winstead* v. *Winstead*, in 1 Haywood, where the question was whether levy on the land of husband and sale after death divests dower. The court was composed of Williams and Haywood. They agreed that the levy did not divest dower but concluded to write their opinions afterwards. Williams failed to send his opinion, so the case was continued, and in October, 1796, came before McKay and Stone. McKay stated that he was not ready to decide the question. Afterwards, at another term, when Williams returned, the case came up again, and he was inclined to change his opinion; so the case was continued again. The final entry is that it went off the docket without decision, whether because the widow Winstead died of old age does not appear. It was impossible for the ablest and best balanced judges to give satisfaction under these adverse circumstances, so there was wide-spread anxiety to procure a change. For eight years of this period, too, these judges,

as I have said, were authorized to express their opinion of the facts to the jury, and as there was no appeal from their decisions, their power was certainly inconsistent with free institutions. It was greater even than in Colonial times, because then the Court of Chancery, and appeal to the King in Council, were checks to unfair decisions.

The student of history sees repeated instances of God's evolving good out of what appeared at the time an unmixed evil. The corrupt conduct of one of our most trusted and beloved public servants proved a partial remedy for our ruinously inefficient judicial systems.

It was found, amid universal horror, that James Glasgow, a Revolutionary patriot, so popular that a county had been called in his honor, Secretary of State since the adoption of the Constitution, by annual election, had been for years confederating with John and Martin Armstrong and others, in cheating the State by the issue of fraudulent bond warrants.

To secure the punishment of these criminals, the General Assembly, probably deeming it more convenient to have the trial at the place where was the Secretary's office, was induced to create an extraordinary court. It was to consist of at least two of the Judges, who were to meet at Raleigh for the purpose of trying this prosecution. While so convened they were authorized to hear appeal of causes accumulated in the district courts. They were to meet twice a year, and to sit not exceeding ten days at each term. Both the Attorney and Solicitor Generals were ordered to prosecute, and a special agent was authorized to prepare and arrange the evidence and attend the trial, the solitary instance in our history of the employment of a public "attorney," charged with the functions of an English "attorney," as distinguished from the barrister. The act was to expire at the close of the session of the General Assembly next after June 10, 1802.

Notwithstanding the fact that Judge Haywood, moved by a fee of $1,000, which was of seductive magnitude in that economical period, resigned his judgeship to appear as

counsel for the defence, the accused were convicted. We find the name of Greene replacing that of Glasgow in our list of counties, and the black lines of expulsion drawn around his name on the books of the venerable order of Masons.

The General Assembly were persuaded to grant the continuance for three years longer of such part of the act as provided for the meeting of the judges for hearing appeals, and to give the court a name, viz., the "Court of Conference." The suspicion that the lawyers were pushing this measure for their own emolument, endangering the passage of the bill, the astounding provision was inserted, as a rider, that "no attorney shall be allowed to speak or admitted as counsel in the aforesaid court." I have called your attention to the fact that a similar ebullition of vulgar prejudice may likewise be found in the Fundamental Constitutions, drawn by the great philosopher John Locke, the ignorant legislators and the learned metaphysician both guilty of the extreme folly, first, of endeavoring to shut out light from the minds of the judges, and, secondly, of supposing that such childish provisions could outwit the lawyers. I hope this august assembly will pardon me for saying that this "Locke on the human understanding" was exceedingly weak.

By the act of 1804, the Court was made a permanent court of record, the judges were ordered to reduce their opinions to writing, and to deliver the same *viva voce* in open court.

In the following year the name was changed to that contemplated by the Constitution, the Supreme Court. An executive officer, the Sheriff of Wake, was given to it and the limit to the duration of the term was removed.

In 1806, a great change was made in the Supreme Court system, for the purpose of relieving the people of long journeys for the purpose of attending to their court business. In modern days we cannot realize the evils in this respect

under which our ancestors suffered. My old grandmother, who was married in 1788, said to me: "Talk about your bridal tours—in my day we had none. The only bridal tour I ever heard of was riding to the nearest judge to sign away the wife's land" Brides whose honeymoon devotion was equal to the sacrifice, were forced to traverse many scores of miles to reach a judge or a county court. Superior Courts, by the new law, were to be semi-annually held in each county. The counties were grouped into six circuits, called also ridings, but the judges were to ride in rotation. In other words, the existing system was adopted. Two new judges were created and four new solicitors. The Supreme Court now consisted of six, but two continued to be a quorum. The preamble of the act asserts that the old system caused such delays as often amounted to denial of justice, and the change was a great relief.

As the judges for the last six years had not elaborated their opinions in such manner as met the approval of the profession, a law was passed in 1810 requiring them to write out their opinions "at full length," which mandate many young students of the law think was in after years occasionally obeyed with too much conscientiousness. For this additional labor they were to be paid £50 ($100) per annum. They were at the same time to elect out of their number a Chief Justice. John Louis Taylor was the first and only judge that held this honorable office. The Governor was required to procure for the court a seal, with suitable devices and motto. Any party to a suit in the Superior Court was given right to appeal to the Supreme Court on questions of law.

For fear that the requisitions as to the opinions would not be carried into effect, in the following year it was provided, in substance, that the decisions of the court should have no validity until the opinions should be delivered publicly and in open court, stating at length the ground of

argument upon which the opinions are founded and supported, and also copies of the same delivered to the clerk.

This completes the legislation prior to the creation of the present organization of the Supreme Court. Although the meeting of the judges at the seat of government to hear appeals was a great improvement on the preceding plan, it was impracticable to secure best results, while the Supreme Court was held by any two of six judges, coming to their labors after long journeying over horrible roads at the rate of three or four miles an hour, and yearning for a needed rest at home. Some of those judges were exceedingly able lawyers. Five of them—Taylor, Hall, Henderson, Ruffin, and Daniel—were eminent members of the new court. Besides these there were others worthy to sit with them; for example, Alfred Moore, afterwards appointed to the Supreme Bench of the United States, and Henry Seawell, one of the strongest criminal lawyers we ever had. Duncan Cameron, of large brain, who, abandoning law to be president of the chief bank of the State, became one of the most astute financiers of the land; David Stone, called from the bench to be Governor and United States Senator. But they did not have the opportunity for profound and uninterrupted devotion to the study of the principles of the cases before them, and that undivided responsibility which stimulates to highest exertions.

I have been somewhat minute in my notices of Ashe, Spencer and Williams, because they were the first judges, and because they sat together for seventeen years of the most important period of our history, ending five years after the adoption of the Federal Constitution. It would be a grateful task to give similar notices of their successors. Even the anecdotes of them which have been handed down should be recorded; such, for example, as that of the simple-minded Lowrie, from the foot of the Blue Ridge, on his first trip to Edenton, stopping a lawyer in his argument, because, from his seat on the bench, he could look out on the bay and see the behavior of two vessels in a gale of wind. "Stop, Mr.

Attorney, this Court sees one ship going one way and another going right opposite in the same wind and the Court does not understand it." And when taken on a visit to one of the vessels, stamping his foot on deck, with some alarm, saying, "I declare, men, I believe she's hollow." But I must content myself with giving, in the appendix, a list of the judges, with the dates of the beginning and ending of their terms.

The year 1818 is the great epoch in the history of the Supreme Court, when we consider the stern economy prevalent in the Legislature of that day, and the general prejudice against enlarging the official class, especially when lawyers only were to be visibly benefited, the creation of these new judges, at an aggregate expense of $7,500, to perform their duties at a place remote from the constituents of the members, is most surprising, and shows that there were very enlightened and influential men in the Legislature in 1818.

I find in that body J. J. McKay of Bladen, Zebulon Baird of Buncombe, M. J. Kenan of Sampson, R. M. Saunders and Bedford Brown of Caswell, James Iredell the younger of Chowan, John Stanly, Wm. Gaston and Viser Allen of Craven, John Winslow of Cumberland, Louis D. Wilson of Edgecombe, John B. Baker of Gates, David F. Caldwell of Iredell, Simmons J. Baker of Martin, Wm. B. Meares of New Hanover, A. D. Murphy, James Mebane and Willie P. Mangum of Orange, Chas. Fisher of Rowan, and other strong men, a goodly array of leaders of the people. Their meeting at this time was not the result of accident. It was a time when there was wild excitement about internal improvements. The great Erie Canal was in progress. The time was approaching when Governor DeWitt Clinton, with a company of great officials, traveled in a canal boat from Buffalo to New York, and amid thunders of cannon passed into the ocean water, brought from Lake Erie. The spirit of canal and river improvements spread like a prairie fire in a windstorm. In North Carolina there were dreams of navi-

gating our streams from near their sources to the ocean. Raleigh was to receive the vessels of Pamlico Sound up Neuse River and Walnut Creek to the crossing of Rocky Branch by the Fayetteville Road. Boats were to ascend and descend the Cape Fear and Deep Rivers to the Randolph hills. The produce of the Yadkin Valley, from the foot of Blowing Rock, was to cross over by canal to Deep River and be exported from Wilmington, and the puffing of steamboats was to echo from the mountains which look down on the headwaters of the Catawba and the Broad. In vain a Chatham member vowed that in dry times a terrapin could carry on his back a sack of flour perfectly dry down Deep and Cape Fear rivers to Fayetteville. All warnings were unheeded. Civil Engineer Fulton was brought from Scotland at a salary of $6,000 to make Asheville, Raleigh, Morganton, Wilkesboro, Rutherfordton, Gaston and Louisburg, seaport towns. The Western people, cut off by long roads of mud and jagged rocks, clamored for State aid. The Eastern people, having by the old Constitution the Legislature by two-thirds majority in both branches, most of them having every access to markets, sat heavily on the treasury box, and hence provoked a demand for a change of the Constitution. This eastern and western question aroused the fiercest passions and sent to the Legislature the ablest men.

This body of enlightened representatives, the General Assembly of 1818, by the triumphant vote of 42 to 16 in the Senate, and 73 to 53 in the House, gave to the State the priceless blessing of a Supreme Court, and manned it with excellent Judges. The constitutional mode of voting for officers was, until 1835, by ballot. John Louis Taylor, Leonard Henderson, John Hall, Archibald D. Murphy, Henry Seawell and Bartlett Yancey were placed in nomination; Henderson and Hall were elected on the first ballot, and Taylor on the second. The great lawyer, Archibald Henderson, of Rowan, was nominated, but withdrawn, as he was unwilling to come in competition with his brother.

The measure was strongly recommended by Governor Branch, who gave his personal observation of the evils of the old system.

The creation of the Supreme Court was a wide departure from the old English system, and from that of our general government, in that its judges do not try cases in the courts below. The English system adopted in 1873 is, in great part, similar to ours. It is easy to see that Congress will adopt our plan before many years. It was feared by many that the efficiency of our judges would be impaired by not having their minds kept alert by occasional friction in actively-contested jury trials. These fears have not been realized. Amid all the changes and excitements, in peace and war, for seventy years, the Court has, as a rule, with only an occasional transient exception, possessed the full confidence of the people. From the beginning, its authority has been extraordinary, being accepted, with rare questioning, not only by this State, but by the tribunals of other States. Under the old system there were very able judges. At one time on the appellate bench we had men of such uncommon strength as Taylor, Hall, Seawell, Ruffin, Daniel. At another period sat together Taylor, Hall, Seawell, Cameron—an aggregate of talent and learning equal to the best bench of any State. But there was not that regularity of attendance, that continuity of work, that sense of individual responsibility which leads to best results. Under the new organization the great principle of division of labor, which has done so much in modern times for promotion of science and the arts, was adopted for our judiciary. The new judges were given salaries ample to enable them to discard all other pursuits, and devote themselves solely to the final settlement of disputed questions involving the lives, the fortunes, the happiness of the people. This grand and sacred trust could not be shirked or shared with others; they had every incentive and full opportunity and leisure to make themselves ex-

perts in their professions, and to labor continuously to acquire new learning and greater wisdom. They were placed on high in sight of all the people. The ablest men, with sharp and critical eyes, watched their actions, ready to detect a failure or reward success. They had an opportunity seldom vouchsafed to men to win the admiration and gratitude of their fellow-citizens by intelligent and faithful work. On the other hand, if, by ignorance or rash spirit of innovation, they should lose the public confidence, the representatives of the people, who, under the Constitution of 1776, had full power over them, would return to the old system, to their eternal disgrace.

It was fortunate for the new experiment that, owing to miry and rocky roads, infrequent bridges and rough ferries over dangerous streams, and long distances from the seat of government, the members of the bar could not generally follow up their cases and argue them before the new tribunal. A few eminent lawyers found it profitable to devote most of their time specially to this practice. The spectacle, so often seen in these days of rapid transit, of counsel from a village where there is no law library, hurrying into the court-room, after a restless night on the cars, beginning his speech by apologies for want of preparation, was never seen in the early days of the Court. The Nestor of the Bar and distinguished ex-member of the Court (Judge Reade), once satirized this practice with that peculiar cayenne pepper pungency which so often made ignorant pertness of the bar flinch and false witnesses quail, and even pierced to the marrow a presumptous "D. D.," who, in a commencement address, assailed the honor of our profession. The Supreme Court bar, composed of such lawyers as Peter Brown, Moses Mordecai, Wm. Gaston, Geo E. Badger, Thomas Ruffin, the elder, Archibald D. Murphy, Archibald Henderson, Henry Seawell, Gavin Hogg, Duncan Cameron, Joseph Wilson, James Martin, prepared with careful study their arguments, cogent in logic and mighty in language, and fortified by

precedent. The judges, aided by this presentation of all the strength of both sides of the case, deliberated with patient care, decided with conscientious desire for the truth, and wrote their opinions elaborately and clearly, for the guidance and instruction of the profession. Such have been the uniform ability, learning and integrity of the members of the Court from the beginning, their freedom, as a rule, from partisan bias, that the people have, as we have seen, with wonderful unanimity, made it part of the fundamental law, one of the corner-stones which support our fabric of government, one of the main props of our social system.

I will not describe in detail the constitution of the court. That can be found in the Constitution of the State and the code of laws. It is, however, a part of my duty to chronicle the principal changes from time to time in its functions.

The number of the judges continued to be three until the Constitution of 1868 increased it to five. The Convention of 1875 reduced it again to three. Experience demonstrated that the business of the Court, settling the litigations of a million and a half of people, was vastly greater than existed for six hundred thousand people in 1818. It was and is a common belief that the late Justice Ashe had his life shortened by labors too arduous for his constitution. By an extraordinary majority, the number, in 1888, was by constitutional amendment increased again to five.

Another change is in the mode of appointment of the Chief Justice. Until 1868 the designation of the judge who was to perform the honorary function of presiding was left to the judges themselves. From the beginning the safe rule was adopted, that the oldest in office should be chief. Henderson and Hall naturally yielded to Taylor, who had been for eight years Chief Justice with entire acceptability over the old court. When Ruffin, after serving as Chief Justice for nineteen years, resigned and came again to the bench in 1858, after the death of Chief Justice Nash, some were of opinion that he would be allowed to resume his old

headship, but Pearson's claim to it under the unbroken rule was allowed without objection. By the Constitution of 1868 the appointment of the Chief Justice is vested in the people. The Constitution of 1876 continues the provision, as well as the designation of the associates as "justices" instead of "judges."

The salaries of the judges are exactly as fixed in 1818. Men have come and men have gone; population has increased threefold; periods of prosperity have been followed by awful financial crashes and prolonged depressions in industrial efforts; near three thousand miles of railway have permeated our land, annihilating distance and economizing time, like the genii of oriental stories on their magic tapestry; the men of the mountains and the men of the seaboard have become next-door neighbors; markets, once possible of access only over roads almost impassable, and many days of toilsome and dangerous journeying, have been brought to our doors; the cultivated land has vastly increased in area; factories are humming, and mines are being dug; yet there stand the same old figures, 2,500, as if engraved on adamant, unchanged, though representing much diminished purchasing power. The General Assembly, to all appeals to their liberality, make the answer that the salary is sufficient to attract the best legal talent and experience; and it is no flattery in me to say that the answer cannot be "traversed," however we can "confess and avoid" it.

When I say that the salary has not been advanced for seventy years, I am not unaware that in the dark days of our great civil war it was nominally raised. For the year 1864 it was $3,000 per annum, and after January, 1865, it was ordered to be $7,000 per annum, but it was payable, by the terms of the law, in Confederate currency, and thus, in effect, in defiance of the Constitution, it was greatly lowered. Applying the scale of depreciation, we find that the salary for 1862, was $1,354 15; for 1863, $283 20; for 1864, only $117; and for the first quarter of 1865, the installment of

$1,750, dwindled down to $17.50. At the end of 1861, it would buy 320 barrels of flour; at the end of 1862, 250 barrels; at the end of 1863, 30 barrels; at the end of 1864, 17½ barrels. The installment of $1,750, payable 1st April, 1865, would buy 3 barrels. The steadfastness and pluck with which the judges performed their duties with this meagre allowance are worthy of all praise.

The time of meeting of the Court has been several times altered. The first term began on the 1st January, 1819, and after that on the 20th days of May and November. This was the next year changed to the third Monday in June and last Monday in December. Soon after, the second Monday in June was substituted for the third, and these continued to be the days of the opening of the Court until the first Mondays of January and July were prescribed in the Constitution of 1868. The Constitution of 1876 omits this provision, and the General Assembly of 1881 fixed the openings on the first Mondays of February and October, as at present. In 1846 the lawyers of the western portion of the State induced the General Assembly to order a term of the Court to be held in Morganton on the first Monday in August for all cases in the counties west of Stokes, Davidson, Union, Stanly and Montgomery, and for cases from these counties, with consent of both parties. The experiment was not satisfactory to the Court or to the profession. Owing to a want of a law library, "Morganton decisions," as they were called, were regarded as less certainly sound than those at Raleigh. The Constitution of 1868 fixed the sessions of the Court "at the seat of government;" that of 1876 leaves the sessions at "the city of Raleigh, until otherwise ordered by the General Assembly."

The judges of the Court, under the Constitution of 1776, were to hold office during good behavior, and were elected by the General Assembly. These provisions were not changed in 1835. Vacancies during the recess of the General Assembly were filled by the Governor and Council, until

the end of the next session. Under the Constitution of 1868 and 1876, the election is given to the people, the term of office is eight years, and vacancies are filled by the Governor alone, until the next general election. What will be the ultimate result of periodical dependence on the will of the people, time will show. One effect is obvious. All the judges as a rule belong to the same political party, whereas the old Court had generally representatives of the two leading parties. It is beyond my province to discuss the propriety of these great changes. Our ancestors in Colonial days yearned and struggled for the life tenure as necessary for the independence of the Court. Whether tenure at the will of the people will prove to be better than was the tenure at the will of the Crown or the Governor, experience will decide. And whether the transfer of the election of the judges from the General Assembly practically to the nominating conventions, will be an evil, must be left to the future.

By the supplemental act of 1818, if a judge of the Supreme Court should be incompetent to decide a case on account of personal interest in the event, or some other sufficient reason, the Governor was authorized to give a special appointment to a Judge of the Superior Court, requiring him to sit with the other judges *pro hac vice*. Under this law Judge Murphy acted at June Term, 1820, in place of Judge Henderson, who had been counsel in important cases before the Court. The validity of the will of Moses Griffin, under which the Griffin Free School in Newbern was established, was maintained by this Court. The law was repealed in 1821.

Since 1834 two judges have been authorized to hold the Court, "in case one of the judges is disabled from sickness or other inevitable cause," and this continues to be the law in substance, *The Code* changing "sickness" to "illness," for what reason I know not. It has been the practice to regard the death of a judge as a disability. This is in the spirit of its act, though hardly written in its letter, as at death the judgeship ceases and there is no judge who can be the sub-

ject of disability. An interesting question would arise if a judge should, without any inevitable cause, but from sheer obstinate neglect of duty, fail to take his seat. It would seem that the other judges must await the removal of the offender by impeachment, or possibly two-thirds of both houses of the General Assembly might regard such contumacious refusal, proof of "mental inability." I suppose, of course, this law will be amended so as to require three instead of two out of the five justices to be present in order to constitute a court.

It was not until 1808 that there was any attempt made by law to furnish the people with the decisions of their highest legal tribunal. In that year the Clerk of the Supreme Court was directed to furnish the Secretary of State a report of the decisions of the preceding four years, and annually those made thereafter. There was no appropriation for the cost of publication, but advertisement was to be made for a printer to do the work at his own expense in consideration of the copyright for seven years, the State to have sixty-six copies free. In 1813, the same niggardly offer was made to the Clerk of the Court, the copyright being extended to the time granted by the laws of the United States. I think these laws led to no result, the reports of that day being published on private account.

In 1818 the Supreme Court was authorized to appoint a Reporter at a salary of $500, on condition he should furnish the State, free of charge, eighty copies of the reports, and the counties sixty-two copies. I presume, though it is not expressly so said, that he was entitled to the copyright. Afterwards he was allowed to print 101 copies for the State and counties at the public expense, and was allowed a salary of $300, and the copyright. In 1852 his salary was raised to $600, and the number of copies for the State increased, so as to supply the libraries of the different States and Territories, and a few others. In 1871 the office of Reporter was abolished, and the duties and emoluments

given to the Attorney General. Afterwards the salary was increased to $1,000, and the State assumed all the expense of printing, distributing and selling the reports in excess of those donated, and covered into the treasury the receipts of sales, less five per cent. commission for selling. The office of Reporter has always been considered a very honorable one, and has been much sought after by aspiring lawyers. The list of reporters in the appendix shows the truth of this.

Of these, Murphy was one of the most energetic and useful men the State ever had in legislative and judicial capacities. He was an enlightened laborer for public education and internal improvements. He collected valuable historical material for writing a history of the State, for the expenses of which he was authorized by law to raise $15,000 by a lottery, but it was not successful. His collections passed into the hands of President Swain, and much of them may be found in the issues of the *University Magazine* published in his day.

Dr. Hawks gave up a brilliant career at the bar for the Christian ministry, became an eminent divine, and an author of valuable historical works. Devereux was forced to surrender a large practice in order to take charge of great estates which he had inherited. Ruffin and Battle became Judges of the Supreme Court. Badger's great career as a lawyer, Judge, Secretary of the Navy, United States Senator, is well known. James Iredell, the younger, had been Speaker of the House, Judge, Governor, and Senator of the United States. Perrin Busbee was an able lawyer, one of the leaders of the Democratic party, and in the line of promotion to the highest offices. Jones was a sound lawyer, and a popular Whig. Winston, to be distinguished from Patrick H. Winston, of Bertie, was regarded as one of the most learned in law and history in his day. Phillips had been Speaker of the House of Commons, refused the tender of a Supreme Court judgeship, and was afterwards Solicitor General of the United States. McCorkle was a big-brained lawyer. I will

not describe Shipp, Hargrove, Kenan and Davidson, first, because they are still alive, and, secondly, they held their post as Reporters by virtue of holding the higher office of Attorney General. This I will say, however, that if they had not towered high as lawyers, among the leaders of their respective parties, they would not have been chosen for the highest non-judicial law office in the State.

The wonderful improvement in the style of the printed volumes was begun by Attorney General Kenan.

The Clerks of the Supreme Court hold a most responsible office. Questions of great complexity are frequently referred to them. The duties require an excellent memory and business head, good knowledge of the law, great accuracy, perfect integrity, untiring patience, and unfailing courtesy.

The Court has been fortunate in its choice of officers. Their names are: Archibald D. Murphy, Wm. Robards, Edmund B. Freeman, Wm. H. Bagley, Thos. S. Kenan (the present incumbent). The Clerk at Morganton was Jas. R. Dodge.

While they all met the approval of the Court, for their intelligence and fidelity, I notice specially Edmund B. Freeman, as having been identified with the Court for a third of a century. The following lines by Mrs. Mary Bayard Clarke, though not historically perfectly accurate, are very touching:

"The old Clerk sits in his office chair,
And his head is white as snow;
His sight is dim and his hearing dull,
And his step is weak and slow;
But his heart is stout and his mind is clear
As he copies each decree,
And he smiles and says as the judges pass,
'Tis the last court I shall see.'
But he lingers on till his work is done,
To pass with the old *regime*,
When he lays his pen, with a smile aside,
To stand at the Bar Supreme;
For the old Clerk dies with the Court he served
For forty years save three;
And breathes his last as the judges meet
To sign their last decree."

The Court was authorized to appoint a Marshal in 1841. Previous to that time the Sheriff of Wake was its executive officer at the term held in Raleigh. The Sheriff of Burke was always its officer at the Morganton term. The names of the marshals were: J. T. C. Wyatt, James Litchford, David A. Wicker, Robert H. Bradley (the present incumbent).

It may interest you to know that Mr. Litchford, when pursuing, in early life, his business as tailor, had an apprentice boy, who, in company with several companions, threw stones at the house of one who had offended them. Dreading prosecution, he left Raleigh for a western home. In 1867 he returned as President of the United States. It was Andrew Johnson.

There have been important changes in the jurisdiction of the Court from time to time.

By act of 1799 the Court therein organized had jurisdiction of questions of law or equity which any judge on the circuit was unwilling to decide, or on which there was a disagreement between the judges.

By act of 1810, any party dissatisfied with the ruling of the Superior Court had a right to remove it to the Supreme Court. By the act of 1818 the judges were to have all the powers of the Superior Court Judges, except that of holding a Superior Court. Any party could appeal from the final judgment, sentence or decree of the Superior Court on giving security to abide the judgment or decree of the Supreme Court, which was authorized to give such judgment as should appear to them right in law, to be rendered on inspection of the whole record. Equity cases could be removed to the Supreme Court for hearing, upon sufficient cause appearing, by affidavit or otherwise, showing that such removal was required for purposes of justice, but no parol evidence was received before the court, or any jury impaneled to try issues, except witnesses to prove exhibits or other documents. Under this provision it became cus-

tomary to remove all important equity causes, so that the Superior Court Judge escaped the responsibility of giving any opinion in the matter. The Constitution of 1868 and that of 1876 put a stop to these proceedings by confining the jurisdiction of the Supreme Court to appeals on matters of law or legal inference. In 1830 original and exclusive jurisdiction was given to this Court for vacation and repeal of grants and letters patent, for fraud, false suggestion or other cause, but this power was also swept away by the same constitutional provision. The provision of the Constitution giving to the Court original jurisdiction to hear claims against the State, and to report their decisions to the General Assembly, has been construed by the Court to embrace only cases involving questions of law.

These are the principal changes made, specially by law, in the functions of the Court. But there was a mighty mass of changes in the character of their work thrown on the judges, by the Constitution of 1868, and the transplanting to North Carolina the Code of Civil Procedure, first elaborated in New York. The Constitution of 1776, even as amended in 1835, was founded on the assumption that the agents of the people, the General Assembly, would be honest and have such stake in the soil that they could be intrusted with powers almost unlimited. They could tax any subject to any amount, and exempt any subject from any tax at all. They had boundless right to pledge the State credit. They had, as I have shown, vast powers in the control of the other departments of government. They had full discretion as to nearly all subjects of legislation.

The Constitution ratified in 1876, which is merely an amendment of that of 1868, is founded on the assumption that the representatives may be untrustworthy. Hence, the executive and judicial departments are made really independent of the legislative. Hence, there are limitations on the taxing power, and on the power of pledging the State credit. Hence, are made a part of the fundamental law numerous provisions, declaring what the General Assembly

must do, what it may do, and what it may or may not do. Many provisions seem properly to belong to the statute books, to be modified or amended whenever the interests of the people require.

The General Assembly of 1868, being composed largely of the dominating spirits of the Constitution of that year, adopted the Code of Civil Procedure, framed to carry into effect the modern innovations in judicial proceedings, without attempting to harmonize them with the former habits of our people. Many of the members of the General Assembly, accustomed to the freedom allowed by the old Constitution, framed and voted for enactments without such careful compliance with the minute provisions of the new instrument as judges are bound to exercise.

Moreover, the amendments to the Constitution of the United States, recently adopted, contain guarantees of privileges and immunities to the freedmen which, from life-time experience of different relations, it was difficult to understand and appreciate thoroughly, and which it required the Supreme Court of the United States to elucidate and settle.

Then, too, the difference of opinion between President Johnson and Congress as to their respective powers in restoring the States which attempted secession, the subversion of the State government set in motion by the authority of the President, and the substitution of one under authority of acts passed by Congress, led to discussions and recriminations, alienations and discord, and in certain localities even to strife.

All these innovations and experiments, and political and constitutional difficulties, threw vast responsibilities and peculiar perplexities on the Court, whose action, while not escaping adverse criticism, was, in the main, conservative and wise. The judges, trained under the old Constitution and legal procedure, have not obstinately impeded the legislative will, however unpalatable. As interpreted by them and amended by the Assembly, the changes seem accepta-

ble to the lawyers, whose practice has been mainly under them. The decisions of the Court on questions growing out of the reconstruction laws have been sustained by the highest tribunal of the land and acquiesced in by all. Neither the people nor the Assembly have resented the frequent declaration of unconstitutionality of legislative acts. On the contrary, the people applauded some of these decisions as preserving them from burdensome taxation.

Another ordeal in the history of the Court, which few tribunals ever pass through unscathed in character, was the civil war. I think it may be said of our Supreme Court that it did not on the one hand so share in the prevaling excitement as to arrest improperly the laws in aid of the war power, or on the other to embarrass the military authorities by unreasonable interference. In defiance of unpopularity and even threats, when the most desperate exertions were put forth in the unequal contest, writs of *habeas corpus* issued by the judges were executed in camps within the sound of the enemy's cannon. And so decisions in favor of military powers of the Confederate Government are such as have been approved by the judicial authorities in favor of the military powers of the United States. The Constitution of the Confederacy on this subject is identical with that of the United States.

I witnessed an interesting scene in the Convention of the reunited Episcopal Church, held in Philadelphia in October, 1865. A proposition was made to petition Congress to exempt candidates for the ministry from military service in future wars, and it seemed to meet with favor. One of the members from the South, a Judge of the Supreme Court of North Carolina, arose and opposed the resolution in strong language and convincing reasoning, sustaining the right of the government in times of war to the service of all its citizens, and their duty to render such service. The speech made a great impression on account of its being from a Southern man, and also because of the evident familiarity

of the speaker with the whole question. It was telegraphed to the leading papers of the North. The resolution was killed at once. The speaker was Judge Battle, giving his carefully prepared opinion on the substitute case of Gatlin *v.* Walton, in which it was decided that Congress can conscript a man who has furnished a substitute under a former law; that one Congress cannot bind a subsequent Congress, or even itself, from calling out, if necessary, all the able-bodied men of the land, and is the sole judge of such necessity.

That the Court has given satisfaction, on the whole, to the profession and the people, is shown, as I have stated, by the strong hold it has upon their respect and confidence. It has been diligent in expounding the principles of the common law and applying them to the facts of the cases before them. When the principles of the common law or of equity, as established in England, are not suited to the condition of a new and unsettled country, it has changed them under the doctrine, *cessante ratione cessat ipsa lex.*

It would be most interesting and profitable to show, in detail, the various departures from English precedents, and the causes therefor, such as "waste" and "pin-money trust," "wife's equity for a settlement," "past performances," "cy pres," "purchasers seeing to the application of purchase money," and so on. It would be equally interesting, but presumption, perhaps, to discuss whether the Court might not advantageously have refused in other cases to follow English precedents, which they admitted to be bad law; but these inquiries belong, more properly, to the history of the law than of the Court. Certainly, I have not time to go into them now.

In the appendix will be found a complete list of the judges since 1818, grouped into four periods, the first ending with the vacation of all the offices of the State in April, 1865; the second ending with the close of the provisional government inaugurated by President Johnson, July 1, 1868; the

third ending with December 31, 1878, during which there were five judges; the fourth coming down to January 1, 1889, during which period there were three Judges.

I will give short notices of those of the judges who have passed away, more particularly of those who were longest members of the Court and had most to do in moulding its character. I begin, of course, with the first Chief Justice, John Louis Taylor.

It would be difficult to imagine how a man could have had a better training for the position of Chief Justice than John Louis Taylor. He was at his election forty-nine years old; was educated at the College of William and Mary, an institution of high character in those days, the college of Jefferson, Madison, Monroe, Winfield Scott and Bishop Ravenscroft, and above all of Chief Justice Marshall. He was one of the leaders of the bars of Fayetteville and Newbern, until elevated to the Bench in 1798. He rode the circuit for twenty years, and was a faithful attendant on the Court of Conference. As already stated he was made Chief Justice of the Supreme Court of 1810–'18. He showed his devotion to his profession by publishing, in 1802, reports of cases determined in the Superior Courts of North Carolina, and in 1814 two volumes of "biographical sketches of eminent judges, opinions of American and foreign jurists, and additional reports of cases determined in our courts," under the title of the "North Carolina Law Repository," and afterwards a third work, containing reports of cases adjudged in the Supreme Court of North Carolina from 1816 to 1818. A charge to the grand jury of Edgecombe was of such excellence as to be published at the request of that body. In conjunction with Henry Potter and Bartlett Yancey, he, at the request of the General Assembly, revised the statute laws of the State and enumerated the statutes of Great Britain in force in North Carolina. In early life he had been an active member of the General Assembly. His judicial labors had been eminently satisfactory. His opinions showed that he

possessed a style not only clear but eloquent. His literary taste was conspicious; his manners elegant and winning.

John Hall, of Warrenton, was by two years the senior of Taylor. Like him, he was trained at William and Mary College. Unlike him, however, he did not have the gifts for rapid success at the bar. He won his way by persevering industry and faithfulness to duty, by constant study, and strictest integrity. He was elevated to the Bench in 1800, and held his place continuously until called to the new Supreme Court. He was not brilliant, but he was eminently a safe lawyer. He had a clear vision for the true points of a case, and had a wide-spread reputation for good sense. His language was plain, but clear and forcible. He was forced by disease to resign a year before his death.

Leonard Henderson, of Granville County, son of Judge Richard Henderson, of Colonial times, was seven years older than Taylor. He was, sometime in early manhood, Clerk of the Court for the district of Hillsboro, an office of considerable dignity. His reputation as a sound and able lawyer, and his popular manners, led to his election as Judge in 1808 During his eight years' service, he gave eminent satisfaction. The public favor towards him and Hall was shown by his election to the new Court on the first ballot over Taylor, Seawell Murphy and Yancey, among the ablest lawyers of that period. He was Chief Justice from 1829 to his death in 1833.

Chief Justice Henderson had a vigorous, self-reliant mind, well stored with the principles of the law. He brought the questions before him to the test of sound reasoning. He was a conscientious seeker for the truth, and had great weight as an upright and wise Judge; but in culture and genius, and love of, and capacity for, labor, was decidedly inferior to his successor. His genial manners and kindly temper gained him great favor with the public.

When these great men one by one passed away, leaving legacies of sound opinions for the better understanding of

the law, the Court had a good measure of popular favor. It was raised to still loftier fame by their immediate successors. Providence vouchsafed to us judges of equal integrity, of still greater ability, and a longer term for efficient work. For sixteen years—1832 to 1848—Ruffin and Daniel sat together on the bench; for eleven years of this time Gaston was their coadjutor. No State of the Union, perhaps, not even the United States, ever had a superior Bench; few ever had its equal. At home and abroad their decisions, as a rule, had the weight of established and unquestioned law.

Of the three the Chief Justice was, undoubtedly, the ablest lawyer. He was in his prime, forty-six years old, when he entered on his great judicial career. He was a graduate of Princeton. He had an exceedingly strong mind, untiring industry and uncommon powers of labor. When interested in great cases he would work all night, without dropping his pen, and be none the worse in health for it. When at the bar, traveling by night, he attended the courts of Person and Granville and the Circuit Court at Raleigh in the same week, a mule, instead of a locomotive engine, being his motive power. He read much and retained all he read. He had been a judge in 1816, and again of the Superior Court in 1825. He had, as president, extricated the old State Bank from its troubles. He had experiences in the General Assembly, and presided as Speaker of the House. In all these positions it was his habit to treat thoroughly and exhaustingly every subject which came before him. His opinions are elaborate and learned treatises on the questions involved. What Judge Pearson said of his opinion in Hoke *v.* Henderson, "that mine from which so much rich ore has been dug," may with equal truth be said of hundreds of others. Hard cases were not quicksands of the law to him. With inexorable logic he carried out the principles of the law, in criminal and civil cases, without being swerved by appeals for relaxation on grounds of

hardship. Without hesitation he joined Gaston in sending Madison Johnson to the gallows, on the doctrine that pre-existing malice is presumed to be continued down to the killing, notwithstanding intervening provocation, although many of the ablest members of the bar agreed with Daniel's dissenting opinion. He never doubted, in excluding evidence of the violent character of the deceased, in Barfield's trial for murder, although Battle's dissenting opinion has been since recognized as good law. I saw him in the Convention of 1861, fiercely indignant at the proposition to abolish corporal punishment. His reply to the argument that it was an outrage to whip a free man, was with bitter emphasis: "Whip a free man! No! Whip a rogue! WHIP A ROGUE." I saw him sentence a young white fellow, of eighteen years old, in Alamance County Court, for stealing money out of a dwelling-house. "Young man, in consideration of your youth, the Court will deal leniently with you, in the hope that you will reform and lead a better life." I watched the boy's face. It brightened as he heard these words, but it was only for a moment, for the Chief Justice added: "Sheriff, take him to the whipping-post and give him thirty-nine lashes on the bare back." He was not a cruel man, but the doctrine, *justitia fiat, ruat cœlum,* was a reality to him. For twenty-three years he was, as the presiding officer of the Court, the greatest factor in moulding the law of the State. After resigning his post, at the age of sixty-five, he was, six years afterwards, induced by an almost unanimous vote of the General Assembly again to take a seat on the Bench, but in eighteen months he finally retired to the charge of his farm, complying, however, with occasional calls for his services on critical occasions.

Joseph John Daniel, of Halifax, was likewise in the prime of life, about the age of the Chief Justice. He had a large brain, but lacked ambition. To the business in hand he addressed himself with conscientious industry and rare ability. But he cared nothing for winning reputation by exhaus-

tive discussions of collateral points not before the Court. He wrote not treatises on the general subject. He had a wonderful memory, probably a more extensive and accurate knowledge of history, especially of the law, than any man in the State, but he made no display and left no written record of it. His early training was at our State University. His opinions are short, but clear and strong and lucid, distinguished for lucidity and terseness. In private life he was singularly unostentatious and charitable and generous. He had only one fault, a habit contracted in early days. Uncle Toby's recording angel was often called on to blot out the careless words which the accusing spirit carried up to Heaven's chancery. I give one case in point to relieve the tedium of my narrative. He was once in church, at which he was a regular attendant, in company with Judge Ruffin, when the inexorable collector, with the inevitable plate, came to his seat. He felt in all his pockets but could only find a $5 gold piece. "Ruffin, lend me a quarter." The Chief Justice shook his head. "Lend me a half." A second shake intimated that this coin could not be had. "Lend me a dollar," and when his companion for the third time expressed his inability to supply his wants, he slammed the gold piece into the plate, saying in desperation "D—n you, go!"

Notwithstanding this failing, Daniel was conspicuous for his obedience to the "Golden Rule." He is said not to have had any eloquence as an advocate, but made his way by learning and diligence.

William Gaston, the third member of the Court, and the oldest of the three, although he had not the reputation of Ruffin for learning in the law, nor of Daniel for learning in history, yet, for a broad, statesmanlike view of legal principles and acquaintance with literature, was unexcelled. He was more of a statesman and had greater oratorical gifts than either. As a member of Congress he impressed Webster and Clay and others as one of the great men of the nation. His long service in our General Assembly and in

the Convention of 1835 was distinguished by the liberal and intelligent views he took of all public questions. He was in 1818 the author and able advocate of the Supreme Court bill. His name was given to a western county because, although he was an eastern man, he had the pluck to advocate a convention for doing justice to the west. It was given to a town on Roanoke river, which had visions of future greatness, because, though his constituents lived on navigable water, he advocated giving State aid to the improvement of the interior streams. It was his personal example which made our people lose their fear of Catholics, and his eloquent advocacy that removed the anti-catholic clause from the Constitution. Beginning the practice of the law at the age of twenty in 1798, the year of Taylor's election to the Bench, he had a successful career as a practitioner, for thirty-five years, before being called to the Bench. He brought to the aid of the Court his extraordinary popularity, and elegant literary style, large legislative experience, and extensive learning in the law.

All the three judges had great natural intellects—all had industry, all had unimpeachable rectitude of purpose, all of them had the unlimited confidence of the bar and laity, all of them were of a conservative temperament, all of them were filled with the desire to decide correctly the cases brought before them, and to give right reasons for their decisions. Their personal relations were harmonious. Orange was then a western county, so that Ruffin was a western man; Daniel a middle county, and Gaston an eastern man. They represented the two great parties of the day. These three great men had just the qualifications and habits to strengthen the Court.

On the resignation of Ruffin, Frederick Nash, under the rule of seniority in service, became Chief Justice, and held the office until his death in 1858. After sixteen years' service as Superior Court Judge, he was elevated to the Supreme Court at the age of sixty-three. Succeeding Gaston, and

sitting with Ruffin and Daniel, whose powers had been increased by years of study of great questions and practice in writing opinions, his reputation was subjected to a most trying ordeal. He proved himself a sound and able judge, and his lofty character, in which all the virtues were harmoniously blended, his great popularity, gained by his unfailing courtesy and kindly heart, continued and strengthened the public confidence in the Court. As Mr. F. H. Busbee well said in an address in presenting a portrait of the Chief Justice to the Court, "clear in his conception of the law, well-versed in its precedents, of singular felicity of language and chasteness of expression, with a simplicity and terseness that would have honored Westminster Hall, he has left opinions which may well bear comparison with those of his great co-laborers."

Before coming to the Bench, Chief Justice Nash had large public experience. He had a full practice at one of the most cultured bars of the State, that of Newbern. He distinguished himself for his readiness, courtesy, firmness and strictest impartiality in the difficult post of Speaker of the House of Commons. In all respects, he was a wise and well-balanced man.

The successor of Nash, Chief Justice Pearson, acted a great part in the legal history of our State. He was a judge for forty-two years continuously, with the exception of the eight months' vacancy in 1865. Of these, thirty years were spent on the Supreme Court Bench; during twenty of them he was Chief Justice. He entered on his judicial career at the age of thirty-one, after a few years' service as a legislator and a large practice at the bar. His mind was singularly clear, strong, incisive, bold and independent. While he had no appearance of self-conceit, he had perfect confidence in his own conclusions. He had no ambition to excel in literature or politics. He despised verbiage, surplusage, shams. He was impatient of efforts to shine in oratory or accumulations of learning. I tried a flight of eloquence on him once. I

saw his eyes begin to look deadly, and I fell to earth at once. I recall his disgust at the sight of a distinguished lawyer carrying into court a wheel-barrow full of books, with which to fortify his argument. He was kind in complimenting a clearly-cut, well-prepared argument, but a speech designed for the glory of the speaker was apt to meet with a sarcasm. His mind was steeped in law. He loved clearness and strength. He was fond of meeting legal difficulties by homely comparisons and phrases. The story of the Memphis lawyer weakening the force of one of his opinions by repeating to the jury a long array of his homely illustrations, may have been true. His wit consisted in unexpected application of legal language to non-legal subjects. Governor Caldwell said to him, when they were both young, "Pearson, why did you let the Bishop confirm you? You know you are not a fit member of the church." "Well," replied he, "when I was baptized, my sponsors stood security for me. I thought it dishonest to hold them bound for me, and I surrendered myself in discharge of my bail." I said to him once—he was always friendly and kind to me—"Judge, please decide a question of law for me: I have two brothers paying me a visit. One is named William and the other Wesley. A lady in town has sent an invitation to 'Mr. W. Battle.' Whom shall I advise to accept it?" "Well, on the principle that every deed is construed most strongly against the grantor, I decide that both should go."

These stories bring out another phase of his character. He was wonderfully genial and kind, especially to young men. This trait made him idolized by his law students. It entered into his decisions. He was watchful for circumstances which could mitigate murder to manslaughter, which could make a case one of larceny rather than one of highway robbery. His leaning was towards mercy.

The Chief Justice became a power in the State. His learning and acuteness and industry made him famous as a lawyer. His students spread abroad his fame as a law-teacher.

When he was nearing his three-score and ten years, his popularity became suddenly eclipsed by his rulings in the cases against Kirk and Bergen. I will not, of course, enter on a discussion of these matters. He has placed on record in the 65th volume of the Reports an unequivocal denial of all charges that he was actuated by any motive but carrying out what he considered his duty under the law. His four associates united in declaring that his rulings had their concurrence, and after his death leading members of the bar bore admiring testimony to his character, and his old law-students, among the most eminent citizens of our State, reared in Oakwood Cemetery, near Raleigh, a monument to his memory.

Associated with Chief Justice Pearson for many years was William Horn Battle, of Orange. He was closely connected with the courts of the State for over a third of a century, beginning with his joint reportership in 1834, and ending in 1868, when, in common with all candidates not nominated by the then dominant party, he failed of re-election. His re-publications of annotated editions of the early Reports, his labors as Reporter and in preparation of the Revised Statutes of 1835 and his Revisal of 1873, and also of the four volumes of his Digest, gave him a thorough knowledge of the statute law of the State and decisions of the courts. He began his judicial labors in 1840, when 38 years old; was a Judge of the Superior Court for about twelve years; this period of service was broken into by a short term on the Supreme Court Bench in 1848, by appointment of Governor Graham. He had a continuous service on the Supreme Court Bench, from his election in 1852, excepting the short interval of 1865, when all the offices were vacated, for sixteen years. From 1845 to his removal to Raleigh in 1868, and for two years before his death, he was principal of a law school and nominally Professor of Law in the University, but received no salary from the institution, and was not responsible for the discipline. After his retirement from

the Bench in 1868, he practiced law in Raleigh, and was for a short time President of the Raleigh National Bank. During the last twenty years of his life, he took great interest in the legislation of his church, being a delegate to its Diocesan and General Conventions. In lieu of any observation of my own, I give an estimate of his judicial character in the words of Mr. Justice Merrimon, extracted from his address at the meeting of the Supreme Court Bar after his death in 1879:

"Judge Battle was a well-read, painstaking and sound lawyer. He was well grounded in the great principles of the law, and was specially familiar with the law and judicial decisions of our own State. Indeed, there has been no lawyer more learned than he in the laws of this State. He was exceedingly fond and proud of his profession; he upheld its honor always and everywhere, and he was an honor to it.

"He was a learned, patient and upright judge. His judicial opinions were well considered and able, some of them strikingly so, and they afford an enduring monument to his memory, while they reflect high distinction on the Bench of the State."

Let me add, for the edification of the younger members of the bar, an anecdote of Judge Battle. In his early days at the bar he was not successful in getting practice. In fact, he said that but for the encouraging words of his wife he would have abandoned the profession in despair. The depression of spirit on this account preyed on his health. His physicians, according to the practice of the old school, advised a whiskey toddy before breakfast. He tried the remedy for some days. One morning, while dressing, he suddenly said, "I have resolved not to take another glass of whiskey." His wife said, "Why? I thought it was doing you good." "Perhaps you are right," said he, "but I found myself dressing fast in order to get to my drink, and I know, by that, it is dangerous." Such was his dread of that terrible poison, which has slain hundreds of our bright and promising lawyers, some of them, even in early life, the leaders of the bar.

Matthias Evans Manly was the last of the old ante-war Court. He was a strong-minded and able man. Like Judges Pearson, Battle and Ashe, he graduated at our University, all of them among the best scholars of their classes. Being a good mathematician, he was employed, after graduation, as an assistant in the mathematical department, and on a vacancy in the professorship, offered to take charge of the department. Although deemed qualified, his youth was considered an objection, and Dr. James Phillips was elected. He then addressed himself to the law, and soon reached the top of his profession. His judicial career extends from 1840 to 1865, twenty-five years, during nineteen of which he was on the Superior Court Bench. He was elected to the Supreme Court in 1859, on the final retirement of Judge Ruffin.

Judge Manly was a very sound and well-read lawyer. He had not the manners of a successful politician. He forced his way by unbending principle, unwavering faithfulness to duty, intellectual force and dauntless pluck. When on the Superior Court Bench he had the undoubting confidence of all in his ability and learning and love of justice. But he sometimes lost patience with the prolixities and wranglings and apparent endeavors to take advantages, of which members of the bar in their zeal are sometimes guilty. His language and manner were, on such occasions, more caustic than was agreeable to the victims. I saw him once administer a rebuke to two of the most emiment practitioners of the State. "I do not sit here," he fiercely said, "to listen to the angry wranglings of attorneys. They must cease." There was no more indecorum during that term.

Judge Manly was on the Supreme Court Bench only about six years. During most of this time, while the great civil war was raging, the number of cases before the Court was greatly diminished. He had not, therefore, the opportunity of rivaling the reputation of the greatest judges of the old Court, but his opinions are clear and forcible, and

show that he was a learned and able judge. He was Speaker of the State Senate in 1866. The General Assembly for that year elected him Senator of the United States, as a colleague of Wm. A. Graham, but neither was allowed to take his seat. He died on June 10, 1881, with the universal respect and confidence of the people.

It is not within my plan to give notices of the living, so I will only mention that after a distinguished career at the bar, in Congress and in the Supreme Court, which he reached after serving about four years as a Superior Court Judge, Edwin Godwin Reade, now most ably presiding over a national bank, is the last survivor of the judges of our highest tribunal elected by the General Assembly. Of those elected by the people three have gone to their final homes. Of these Nathaniel Boyden came to the Bench at a greater age than any other of all the judges—at three score and sixteen. He had been an active member of the bar for forty-eight years, had been a member of the State and Federal legislatures, but had never held a judicial office. He had a mind of a high order, was a most adroit, zealous and successful practitioner, possessed abundant learning in the law, and was a conspicuous figure in the *nisi prius* courts of the State. If he had come to the Supreme Court Bench at an earlier age, and had larger practice in its duties, he would have won high distinction as a judge.

Thomas Settle was eminently fitted for political life. He had great force of character, uncommon oratorical powers, a bold and independent spirit, a high order of ability, and exceedingly agreeable manners. The campaign between him and Zebulon B. Vance for Governor in 1876, will long be remembered for its brilliancy, only equaled, according to tradition, by that between Graham and Hoke in 1844. He was a successful practitioner in the courts, winning fame as Solicitor of his circuit in the prosecution of criminals. He was a ready and accomplished presiding officer of our State Senate and House of Commons. His heart was not in

the judgeship, as was shown by his twice resigning his seat in order to enter the political field. His opinions, though pointed and clear, do not show the learning and logical powers of the old-time judges. He had the ability, however, to become a great judge, if his ambition had taken that direction.

Thomas Samuel Ashe, a lineal descendant of one of the first three Supreme Court Judges of free North Carolina, was after the best type of our great judges. After an eminent career at the bar and in the State Legislature, and as Confederate States Senator and member of the Lower House of Congress of the United States, he came to the Supreme Bench by popular election in 1878, at the age of sixty-six. He died in February 1887, after eight years' service. He threw his whole strength into his work. He endeavored to make up for the time lost from the law while engaged in exacting legislative duties, and time-consuming practice in the Superior Courts, by close and unremitting study, trenching on the hours needed for repose. He succeeded in adding to his already great reputation for ability, and by the strength and learning displayed in his opinions he won a place little inferior to the best of his predecessors. It is believed that the severe labors his conscientiousness forced on him shortened his life.

Judge Ashe was one of a type not often found among us in these nervous and impetuous days—the old-school gentleman. He was tall, stately, dignified, courteous, respectful to all, and exacting respect from all. Washington was of that pattern, and Generel Lee, and Governor Graham, and General Samuel F. Patterson, and Chief Justice Nash. It is impossible to imagine an unworthy act by such men. But under his self-contained exterior was abundance of fire, and under his grave manner abundance of humor. I have never seen the fire flash, but I have seen the humor play over his countenance like sheet lightning over a summer cloud. I recall his hearty laugh when he told me how, after

the University had conferred the degree of Doctor of Laws (LL. D.) on himself and Judge Dillard, he went into the latter's room and found him investigating a knotty case, lately argued before the Court, and saluted him thus: "Good morning, Doctor Dillard." "What do you mean," replied he, looking up from his papers and books. "What do you call me doctor for?" "Haven't you read in the morning paper," said Judge Ashe, "that the University has made us Doctors of Laws?" "Well!" said Dillard, gloomily, "am I not a great Doctor of Laws, when I cannot, for the life of me, tell whether old Mibra Gulley ought to have brought this action before the Clerk or in term? I must say that I have not as much respect for the Trustees as I had before the degree was conferred." (See 81 N. C., 356.)

For the encouragement of those *twigs* of the law whose early success is impeded by bashfulness—a rare quality, however, in these spouting days—permit me to state that, when Mr. Ashe made his first speech—it was at Hillsboro court—his fright was so great that his tongue refused to go further than "Gentlemen of the Jury." He was about to take his seat in despair, when Mr. Priestly Mangum, the County Solicitor, arose and said: "May it please your Worships, I request the gentleman to stop a moment, to allow me to call some witnesses to go before the Grand Jury." This kindly interruption gave the young attorney time to recover his self-possession, and he made a creditable appearance.

Judge Dillard, recognized as one of our ablest lawyers, told me that his (Dillard's) first case was in Danville, Va., where the pleadings were required to be drawn out in full. He declared on a promissory note, "payable 90 days after date." These words were carelessly omitted in his declaration, and the consequence was a fatal variance in the proof. Said the Judge: "I took a nonsuit, paid the costs ($13.50) out of my own pocket, and got more profit out of that expenditure than out of any I have since made. I was afterwards careful never to make a mistake." I feel sure the Judge will

pardon me for putting on record this incident, on account of its valuable lesson to those whom he loves so well, the young men of the bar.

Mr. Chief Justice: In conclusion I return to you and your associates, and to the members of the bar, my thanks for the great honor you have conferred on me in assigning to me the preparation and delivery of this address. It has been to me a labor of love. From boyhood I have had the strongest veneration for the Supreme Court of North Carolina. Far back in my memory, on the borderland of childhood, in the days of Devereux and Battle, I can see the neatly written copies by my mother, as amanuensis, of the opinions of Ruffin, Daniel and Gaston, and I can recall her voice as she praised their greatness and by these praises sought to arouse the ambition of her children. A collateral benefit of the establishment of the Court has been the elevation of the bar of the State, by their constantly having before their eyes the highest standard of legal learning, tireless industry, and inflexible rectitude. The labors of the students are stimulated by the hope of winning the encomiums of the examining judges, the labors of the lawyers are stimulated by the hope of winning the decisions of the Court, the Superior Court Judges are urged to greater diligence and care by fear of their reversals. The aspiring spirits fix their eyes on the lofty prize of a seat on the Bench, and, thanks to a justice-loving people, strive to gain it, not by the politican's wiles, but by becoming conspicuous for legal learning and spotless character. It is a glorious thing that all our people have an assured confidence that the mantles of our great and good judges of the past have fallen on men worthy to wear them, on men who will leave the Court to their successors, fixed in the hearts of the people, as firmly as are the eternal principles of *Magna Charta* and the Bill of Rights, of which it is the trusty guardian.

APPENDIX No. 1.

List of Judges from 1777 to 1st January, 1819.

The First Period,

Begins in 1777 and ends in 1790, during which the number of the Judges was three.

Samuel Ashe, of New Hanover, elected in 1777, was in office in 1790.

Samuel Spencer, of Anson, elected in 1777, was in office in 1790.

James Iredell, of Chowan, elected in 1777, resigned in 1778.

John Williams, of Granville, elected in 1778, was in office in 1790.

The Second Period,

From 1790 to 1806, when there were four Judges.

Samuel Ashe, elected in 1777, resigned in 1795.

Samuel Spencer, elected in 1777, died in 1794.

Jno. Williams, elected in 1778, died in 1799.

Spruce McKay, of Rowan; elected in 1790, was in office in 1806

Jno. Haywood, of Halifax; elected in 1794, resigned in 1800.

David Stone, of Bertie; elected in 1795, resigned in 1798.

Alfred Moore, of Brunswick; elected in 1798, resigned in 1799.

Jno. Louis Taylor, of Craven; elected in 1798, was in office in 1806.

Samuel Johnston, of Chowan; appointed in 1800, resigned in 1803.

John Hall, of Warren; elected in 1800, was in office in 1806.

Francis Locke, of Rowan; elected in 1803, was in office in 1806.

THE THIRD PERIOD,

From 1806 to January 1, 1819, when there were six Judges.

Spruce McKay, of Rowan; elected 1790, died 1808.

John Louis Taylor, of Craven; elected 1798, elected to Supreme Court in 1818.

John Hall, of Warren; elected 1800, elected to Supreme Court in 1818.

Francis Locke, of Rowan; elected 1803, resigned 1814.

David Stone, of Bertie; elected 1806, resigned 1808.

Samuel Lowrie, of Mecklenburg; elected 1806, died 1817.

Blake Baker, of Warren; appointed 1808, commission expired 1808.

Leonard Henderson, of Granville; elected 1808, resigned 1816.

Joshua Granger Wright, of New Hanover; elected 1808, died 1811.

Henry Seawell, of Wake; appointed 1811, commission expired 1811.

Edward Harris, of Craven; elected 1811, died 1813.

Henry Seawell, of Wake; appointed in 1813, resigned 1819.

Duncan Cameron, of Orange; appointed 1814, resigned 1816.

Thomas Ruffin, of Orange; elected 1816, resigned 1818.

Joseph John Daniel, of Halifax; appointed 1816, elected to Supreme Court 1818.

Robert H. Baker, of Lincoln; appointed 1818, resigned 1818.

Blake Baker, of Warren; appointed 1818, died 1818.

The fourth period, as given in Second Revised Statutes, embracing the names of the Superior Court Judges since 1818, does not come within the scope of my narrative.

APPENDIX No. 2.

List of Judges of the Supreme Court Since 1818.

The First Period.

John Louis Taylor, of Craven, Chief Justice; elected 1818, died January, 1829.

Leonard Henderson, of Granville, Chief Justice, 1829 to 1833; elected 1818, died August, 1833.

John Hall, of Warren; elected 1818, resigned December, 1832.

John DeRosset Toomer, Cumberland; appointed June, 1829, resigned December, 1829.

Thomas Ruffin, of Orange, Chief Justice, 1833 to 1852; elected 1829, resigned November, 1852.

Joseph John Daniel, of Halifax; elected 1832, died February, 1848.

William Gaston, of Craven; elected 1833, died January, 1844.

Frederick Nash, of Orange, Chief Justice, 1852 to 1858; appointed May, 1844, died December, 1858.

William Horn Battle, of Orange; appointed May, 1848, resigned December, 1848.

Richmond Mumford Pearson, of Yadkin, Chief Justice, 1858 to 1865; elected December, 1848, office vacated April, 1865.

William Horn Battle, of Orange; elected December, 1852, office vacated April, 1865.

Thomas Ruffin, of Orange; elected 1858, resigned fall of 1859.

Matthias Evans Manly, of Craven; appointed 1859, office vacated April, 1865.

THE SECOND PERIOD,

From January, 1866, when the Judges elected by the General Assembly, organized by the authority of the President, began their service, to the close of June Term, 1868, when their offices were vacated by virtue of the Reconstruction Acts of Congress.

Richmond Mumford Pearson, of Yadkin, Chief Justice; elected 1866, office vacated July, 1868.

William Horn Battle, of Orange; elected 1866, office vacated July, 1868.

Edwin Godwin Reade, of Person; elected 1866, office vacated July, 1868.

THE THIRD PERIOD,

From July 1, 1868, when the Justices under the Constitution of 1868 began service, to 1879, when the number was reduced from five to three.

Richmond Mumford Pearson, Chief Justice; elected 1868, died January 5, 1878.

Wm. Nathan Harrell Smith, of Wake, Chief Justice; appointed January, 1878, term expired January 1, 1879.

ASSOCIATE JUSTICES.

Edwin Godwin Reade, of Person; elected 1868, term expired January 1, 1879.

Wm. Blount Rodman, of Beaufort; elected 1868, term expired January 1, 1879.

Robert Paine Dick, of Guilford; elected 1868, resigned 1872.

Thomas Settle, of Rockingham; elected 1868, resigned 1871.

Nathaniel Boyden, of Rowan; appointed 1871, died November 20, 1873.

Wm. Preston Bynum, of Mecklenburg; appointed 1873, term expired January 1, 1879.

Thomas Settle, of Rockingham; appointed 1872, resigned 1876.

Wm. Turner Faircloth, of Wayne; appointed 1876, term expired January 1, 1879.

THE FOURTH PERIOD,

From January 1, 1879, to January 1, 1889, during which the number of Justices was three.

Wm. Nathan Harrell Smith, Chief Justice; elected 1878, re-elected 1886.

ASSOCIATE JUSTICES.

Thomas Samuel Ashe, of Anson; elected 1878, re-elected 1886, died February 4, 1887.

John Henry Dillard, of Rockingham; elected 1878, resigned February 11, 1881.

Thomas Ruffin, of Orange; appointed 1881, resigned 1883.

Augustus Summerfield Merrimon, of Wake; appointed September 29, 1883, elected 1886.

Joseph Jonathan Davis, of Franklin; appointed February 4, 1887, elected 1888.

Alphonso Calhoun Avery, of Burke; elected 1888.

James Edward Shepherd, of Beaufort; elected 1888.

APPENDIX No. 3.

LIST OF REPORTERS OF CASES DECIDED PRIOR TO JANUARY, 1819.

Judge John Haywood, from 1789 to 1806 (1st and 2d Haywood Reports).

Judge F. X. Martin, from 1795 to 1797 (1st and 2d Martin's Reports).

Judge John Louis Taylor, from 1799 to 1802 (Taylor's Reports).

Duncan Cameron and William Norwood, from 1802 to 1805 (Conference Reports).

Judge John Louis Taylor, 1813 to 1816 (Carolina Law Repository, 2 vols.).

Judge John Louis Taylor, 1816 to 1818 (Term Reports).

Judge A. D. Murphy, 1804 to 1813, and at July Term, 1818 (1st and 2d Murphy).

APPENDIX No. 4.

LIST OF REPORTERS SINCE 1818.

Archibald D. Murphy, 1819 (3 Murphy).

Thomas Ruffin, January Term, 1820 (1st part of 1st Hawks).

Francis L. Hawks, 1820 to 1826.

Geo. E. Badger, with Devereux, January Term 1826 (1st part of 1st Devereux).

Thomas P. Devereux, 1826 to 1834.
Thos. P. Deverex and Wm. H. Battle, 1834 to 1840.
Wm. H. Battle, January Term, 1840, (1st part of 1st Iredell).
James Iredell, 1840 to 1852.
Perrin Busbee, 1852 to 1853.
Quentin Busbee, Fall Term, 1853 (2d part of Busbee).
Hamilton C. Jones, 1853 to 1863.
Patrick H. Winston, Sr., 1863 to 1864.
Samuel F. Phillips, 1866 to 1870.
James M. McCorkle, 1871.
Wm. M. Shipp, Attorney General, 1872.
Tazewell L. Hargrove, " " 1873—1876.
Thos. S. Kenan, " " 1877—1884.
Theo. F. Davidson, " " 1885.

INDEX.

INDEX.

ACTION TO RECOVER LAND:

1. Where the title to land is put in issue by the pleadings and issues, the verdict and judgment operate as an estoppel on the parties as to the title. *Allen* v. *Sallinger*, 14.

2. The Court has countenanced and approved the practice of defining, in the verdict, the extent of the plaintiff's interest in the land in controversy, either by metes and bounds, or as an undivided fractional interest. *Ibid.*

ADDRESS—K. P. BATTLE:

History Supreme Court of North Carolina, 441.

ADMINISTRATION.

1. Where a judgment absolute is rendered against executors, fixing them with assets, and they pay it, their personal representatives cannot afterwards recover the amount thus paid out of the estate of their testator. *Perkins* v. *Berry*. 131.

2. Where, in a creditor's bill against the personal representative, it is sought to have the lands of decedent sold for the satisfaction of the debts proven, the real representatives of decedent must be made parties, before any judgment subjecting the real estate can be entered. *Ibid.*

3. Where, in an action brought on a note given, with a surety, by a distributee of an estate to the administrator, it was adjudged that the administrator recover the amount of the note, but that no execution issue until the Clerk should determine the amount of the distributive share of the principal debtor in the estate on the final accounts of the same, and such amount should be credited before issuing of execution: *Held*, that it was competent for the Court, at a subsequent term, upon a report of the Clerk, in this action, that nothing was due on the distributive share, and there being no exception, to modify the judgment and order execution to issue, notwithstanding that in proceedings by the administrator against the distributees for a final settlement, in which there was a report of the Clerk that nothing was due on said distributive share, and an appeal from a judgment confirming the report. *Scroggs* v. *Alexander*, 162.

4. In a proceeding by an administrator against the non-resident widow of a decedent who had not, for several years after his death, applied for letters of administration, she cannot be heard

to say that the letters granted to the plaintiff were void, because she was the widow and had not waived her right to administer; at most, the appointment was only voidable and could be attacked only by a direct proceeding to remove the plaintiff. *Lyle* v. *Siler*, 261.

5. When it appears that the appointment of the plaintiff as administrator was *void*, a defendant can avail himself of a plea of *ne unques executor*. *Ibid.*

6. While a sum, which has been carelessly, voluntarily and without reasonable inquiry, overpaid as a legacy or distributive share, before the settlement of an estate, cannot be recovered by an executor or administrator; but when an overpayment was made to a legatee after the settlement of the estate, from which it was due, not officiously and voluntarily, but by *mistake* (of fact), the sum overpaid can be recovered. *Ibid.*

ADMINISTRATOR: See ADMINISTRATION.

ADVANCES:

When payable, 59.

AGREEMENT NOT TO PLEAD STATUTE OF LIMITATIONS, 34.

AGRICULTURAL SOCIETIES:

1. The provisions of ch. 33, Acts of 1887, amending the charter of the Roanoke and Tar River Agricultural Society, incorporated under chapter 88, Private Laws of 1870–'71, which forbids any person, not doing a regular business within half a mile of the grounds of the society, from selling, &c., any liquors, tobacco, or other refreshments, &c., within that distance from said grounds, and making it a misdemeanor so to do, is constitutional—not violating section 7, Article I, as to *exclusive emoluments* or *privileges*, nor section 31, as to *perpetuities* and *monopolies*. *State* v. *Stovall*, 416.

2. The power of the Legislature to enact laws conferring police powers, regulating traffic, &c., in certain localities, &c., is established, and such power is properly exercised for the encouragement of agricultural societies, and providing regulations for preserving order and promoting the comfort, &c., of those assembled at their fairs. *Ibid.*

ALLOTMENT OF DOWER:

In mortgaged lands, 285.

AMENDMENT:

1. The Superior Court has power to *amend*, after verdict, a warrant brought by appeal of defendant from a Justice's Court, charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "wilful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." *State* v. *Smith*, 410.

2. Where a defendant was tried in the Court below, as upon a plea of not guilty, the Court, at a subsequent term, ought, upon the facts being made to appear, to direct the plea to be entered *nunc pro tunc*. *State* v. *Farrar*, 411.

Of criminal statute, 356.

APPEAL:

1. Where, upon motion to dismiss an appeal on the ground that the undertaking was not filed in time, it appears that the appeal was taken in good faith, and the failure to file the undertaking in time was caused by the Clerk of the Superior Court being absent from his office, the motion will be denied. *Jones* v. *Wilson*, 13.

2. A motion will not be entertained in the Supreme Court to allow an appellant to file a record of proceedings subsequent to the appeal, and independent of it, for the purpose of making a case here substantially different from the one tried in the Court below, nor will the case be remanded for a like purpose. *Whitehead* v. *Spivey*, 66.

3. Although an appeal before any judgment is rendered below is premature, and will be dismissed, yet when it appears that a decision by this Court of the point intended to be raised by the appeal will practically terminate the action, the opinion of the Court will be given. *Thornton* v. *Lambeth*, 86.

4. The presumption is in favor of the regularity and correctness of the proceedings below, and error will not be presumed unless it is assigned and shown. Therefore, when it appears from the record, that, upon affidavit, the plaintiff obtained an order for service, by publication of summons, on a non-resident defendant, and that there was affidavit of the publisher of a newspaper that publication was made, this Court will not presume any defect in the service, in the absence of assignments specifying the particular defects here insisted on. *Lyle* v. *Siler*, 261.

5. The refusal by the Judge below to permit an amendment is unreviewable. *Blackwell* v. *Dibbrell*, 270.

6. The Court below may require the grounds of objection to testimony to be stated. If, after being required by the Court to state his objections, a party refuse so to do, his exception shall avail him nothing in this Court. *State* v. *Wilkerson*, 337.

7. Where the examination of a witness is taken down in writing by a committing Magistrate, and afterwards read in evidence on the trial in the Superior Court, the defendant objecting, and it does not appear from the record and statement of the case on appeal whether the witness signed the examination or not, it will be presumed in this Court that the witness did sign, and that the Magistrate complied with the duties imposed upon him by the statute. *Ibid.*

8. An affidavit, upon which is founded an order allowing a convicted person to appeal, *in forma pauperis*, under *The Code*, § 1235, is fatally defective if it does not state that the application is in good faith. Such averment is not required in civil cases under *The Code*, §§ 552, 553. *State* v. *Low*, 350.

9. If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form; but if they are sent up, and are not in due form, the appeal will be dismissed on motion of the appellee. *Ibid.*

10. The transcript of the record sent to this Court in a State case, failing to show that a Court was held by a Judge at the time and place prescribed by law, that a grand jury was drawn and sworn and presented the indictment, that the plea of not guilty was formally entered, is fatally defective, and the Court will not proceed to decide the question presented in the assignment of error, but will remand the case, that the record may be perfected. *State* v. *Farrar*, 411.

11. Where no exceptions are made below, and no error is apparent upon the record, the judgment will be affirmed. *State* v. *Bell*, 438.

APT TIME:

1. A petition for a cart-way was filed before the Board of Supervisors, the prayer of the petition was granted, and respondent appealed to the Commissioners and thence to the Superior Court. After the jury was impaneled to try the issues raised between the petitioner and respondent, a motion was made for the first time to dismiss the petition for the want of proper allegations: *Held*, that the motion was not made in apt time, and it was error to grant it. *Warlick* v. *Lowman*, 122.

2. Where, by statute, the Superior Court is authorized to try any case by *consent* at a term devoted exclusively to criminal actions, and a bastardy proceeding is regularly tried, the defendant making no objection until after verdict: *Held*, that in law the defendant is deemed to have assented to the trial, and his objection was not in apt time. *State* v. *Giles*, 391.

Objection to evidence in apt time, 147.

ASSIGNMENT OF ERRORS, 261.

ASSAULT WITH INTENT TO COMMIT RAPE:

Form of indictment, 323.

ATTORNEY AT LAW:

The Code, § 1353, does not forbid a prosecuting attorney to make such comments upon the testimony as would have been legitimate before the passage of the act. That section enlarges the privileges of the prisoner, but does not abridge the rights of the State's officers. *State* v. *Weddington*, 364.

BASTARDY:

1. The affidavit in a bastardy proceeding may be amended in the Superior Court, with the permission of the Judge, and there is nothing in the point that such amendments cannot be made, after the defects are pointed out by a motion to dismiss. *State* v. *Giles*, 391.

2. A former proceeding in bastardy, which was dismissed for want of jurisdiction, is no bar to a second proceeding based upon the same charge. *Ibid.*

3. The fact of illicit intercourse with others, even when approaching a habit, does not, in the absence of other evidence tending to prove the falsehood of the charge, rebut the presumption given by the statute to the examination of the woman in bastardy proceedings. But it is otherwise, if habitual intercourse with another man, about the time the child must have been begotten, is proven. *Ibid.*

4. Where, by statute, the Superior Court is authorized to try any case by *consent* at a term devoted exclusively to criminal actions, and a bastardy proceeding is regularly tried, the defendant making no objection until after verdict: *Held*, that in law the defendant is deemed to have assented to the trial, and his objection was not in apt time. *Ibid.*

5. The statute regulating the judgment in bastardy proceedings, by which a fine of ten dollars and the payment of fifty dollars for the support of the child are imposed upon the defendant, and

he is imprisoned until he makes payment, is constitutional, as the defendant can be relieved of the imprisonment under the insolvent debtor's law (*The Code*, § 2067). *Ibid.*

BATTLE, K. P.:

Address on History of Supreme Court of North Carolina, 441.

BILLS, BONDS, AND PROMISSORY NOTES:

1. Plaintiff having been sued by the indorsee of his note, and judgment obtained against him, the indorser is sufficiently protected against his suretyship for plaintiff by a stay of execution of plaintiff's judgment against him, on his guaranty of the article for which the note was given, until plaintiff has satisfied the indorsee's judgment. *Baker* v. *Brem*, 72.

2. When one partner buys goods for the firm, and they are used for partnership purposes, but he gives his individual note for the price, he is entitled to have the note paid out of the partnership assets. *Thornton* v. *Lambeth*, 86.

3. One who obtains possession of a negotiable paper, after indorsing it, is restored to his original position, and cannot hold intermediate parties who could look to him. It is equally true that one who derives possession of the paper from him, with notice of this fact, cannot hold such intermediate indorsers liable; and when such indorsements are in *blank*, oral testimony is admissible to show the relation in which they stand. *Adrian* v. *McCaskill*, 182.

4. The construction placed upon *The Code*, § 177, by *Harris* v. *Burwell* and *Martin* v. *Richardson*, is confined to the makers of promissory notes, and does not apply as between indorsers. *Ibid.*

5. The payee in a negotiable note indorsed it in blank and delivered it, before maturity, to McC. as a collateral. McC. also indorsed the note in blank before maturity. and delivered it to W. & Co. as collateral. McC. redeemed and took up the note from W. & Co., before its maturity, and continued to hold it until *after its maturity*, when he returned it to the payee without erasing his (McC.'s) name as indorser. The *payee* then sold the note to plaintiffs for value. Plaintiffs had no actual notice of the former dealing and transactions connected with the note: *Held*, (1) that as plaintiffs derived their title directly from the original payee, who had re-acquired title, they could not hold the indorser McC.; (2) that plaintiffs were affected with, and bound by, notice of what appeared on the note itself, to-wit, that the person from whom they purchased was the payee and first

indorser; (3) that the indorsement of McC., although in blank, could not have been filled up by plaintiffs with their own names, because, having purchased the note from the payee, whose indorsement was *prior* to McC.'s, it would have been a gross wrong, if not a fraud, upon McC.; (4) that plaintiffs could not hold McC. as an accommodation indorser or guarantor, because, having purchased the note after maturity, and with notice of its dishonor, the facts which discharged McC. could be set up as a defence. *Ibid.*

6. A collateral oral agreement, between the maker and accommodation indorser of a negotiable note, that it should be negotiated at bank, does not affect one who purchases the note, for value and before maturity, from the maker; and this is so, although the purchaser has notice of such agreement at the time he takes the note. *Parker* v. *Sutton*, 191.

7. The maker of a note was examined in a supplemental proceeding, brought against the payee, and upon such examination admitted that he owed the payee the amount of the note. An order was made that a part of the money due on the note be paid to the plaintiffs in such proceeding, with which order the maker complied. At the time the proceedings were commenced the payee in the note had already transferred it *bona fide*, and before maturity, to A, who was never made a party to the proceeding: *Held*, that A could recover from the maker, in a separate action, the full amount of the note, with interest and costs, as it was the maker's folly to admit owing the note to the payee before ascertaining whether the note had been negotiated; and A not being a party, all that was done in the supplemental proceeding was *res inter alios* as to him. *Rice* v. *Jones*, 226.

8. While a "due-bill" is not a promissory note, and negotiable by indorsement, it is within the meaning of the words, "or other obligation," in § 1064 of *The Code*. The larceny of such a paper is indictable under that section. *State* v. *Campbell*, 344.

BLANK INDORSEMENT:
Oral evidence to explain, 182.

BURDEN OF PROOF:
A party to a civil action, who has the affirmative of a material issue, must establish his contention by a preponderance of evidence, and proof of notice of an equity is not an exception to the rule. *Giles* v. *Hunter*, 194.

BURGLARY:
Upon an indictment for burglary it is competent for the State to show acts and conversations of the defendant which tend to fix

him with a knowledge of the location of the premises, and the condition and circumstances of the prosecutor. *State* v. *Ward*, 419.

CART-WAYS:

1. Section 2056 of *The Code* is in derogation of the rights of land-owners, and must be strictly construed. *Warlick* v. *Lowman*, 122.

2. A petition for a cart-way was filed before the Board of Supervisors, the prayer of the petition was granted, and respondent appealed to the Commissioners and thence to the Superior Court. After the jury was impaneled to try the issues raised between the petitioner and respondent, a motion was made for the first time to dismiss the petition for the want of proper allegations: *Held*, that the motion was not made in apt time, and it was error to grant it. *Ibid.*

3. A cart-way will not be granted under *The Code*, § 2056, as a mere matter of convenience, but only when it is necessary, reasonable and just that the petitioner should have it. *Ibid.*

4. The form of the petition, and proper methods of procedure, under *The Code*, § 2056, pointed out. *Ibid.*

CAVEAT EMPTOR:

When doctrine applies to indictment for false pretence, 337.

CHATTEL MORTGAGE: See MORTGAGE.

CHEROKEE LANDS: See ENTRY AND GRANT.

CLAIM AND DELIVERY:

1. A brought an action of claim and delivery before a Justice of the Peace, and took the property from the defendant under the process of that Court. Upon the trial, the Justice ruled that he had no jurisdiction, made an order of restitution, and gave judgment in favor of the defendant for $150, as the value of the property in dispute, to be collected in the event the property was not restored. A then brought an action in the Superior Court to restrain the collection of the judgment for $150. A restraining order was denied him, and he paid the $150. Afterwards the Judge permitted A to amend his complaint so as to set up the payment of the $150, and demand judgment for same: *Held*, (1) that denial of restraining order was proper; (2) that as the $150 was not paid until after the action was brought, it was

error to allow the amendment; (3) that the allowance of such amendment was also erroneous because it changed the action and made it substantially a new one; (4) that the demand for the $150 sounded in contract, and therefore the Superior Court had no jurisdiction of an action to recover it. *Powell* v. *Allen*, 46.

2. The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any *debt* which plaintiff may recover in the action. *Hall* v. *Tillman*, 276.

3. Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by *The Code*, § 326 (as amended by ch. 5, § 2, Laws 1885) and § 431. *Ibid.*

4. The effect of the amendment to *The Code*, § 326, by ch. 50, § 2, Laws 1885, is to make the condition of the bond therein provided for harmonious with the judgment authorized by the law regulating proceedings in claim and delivery. *Ibid.*

CODE, THE:

Section 38 396
" 83 120
" 117 210
" 120 ..... 210, 282
" 148 ..... 57, 82, 191
" 152 190
" 163 82
" 168 191
" 177 186
" 196 ..... 367, 369
" 198 ..... 368, 369
" 237 282
" 246 320
" 269 393
" 270 393
" 326 279
" 431 ..... 280, 281
" 433 120
" 435 120
" 490 231
" 493 231
" 494 ..... 231, 233
" 497 ..... 232, 233
" 514 172

Section 528 129
" 530 269
" 552 351
" 553 352
" 573 ..... 267, 268
" 574 181
" 590 ..... 154, 156
" 702 335
" 705 335
" 707 258
" 840 274
" 875 211
" 883 210
" 884 210
" 985 ..... 358, 362
" 1028 437
" 1064 345
" 1077 413
" 1079 418
" 1101 324
" 1102 324
" 1113 375
" 1120 ..... 354, 410
" 1125 382
" 1235 352
" 1326 176
" 1334 176
" 1353 373
" 1754 63
" 1755 63
" 1759 65
" 1810 114
" 1826 305
" 1828 304
" 1831 304
" 1832 304
" 1836 304
" 2056 123
" 2067 397
" 2103 292
" 2136 42
" 2147 42
" 2346 217
" 2347 217
" 2681 384
" 3464 ..... 256, 258

Section 3465 ..... 256, 258
" 3544 394
" 3670 418
" 3671 418
" 3704 363
" 3710 103
" 3712 103
" 3713 103
" 3766 ..... 359, 362, 363
" 3803 ..... 261, 407
" 3808 255
" 3810 255
" 3811 255
" 3818 ..... 255, 405
" 3820 ..... 260, 405
" 3827 407
" 3836 129

COMMENTS OF COUNSEL, 364.

COMPROMISE:

1. The payment and acceptance of a less sum than is actually due, in compromise of the whole debt, is a complete and valid discharge, under *The Code*, § 574. And this is so, although the debt compromised was one contracted and reduced to judgment before § 574 became the law, if the compromise was made after § 574 was enacted. *Koonce* v. *Russell*, 179.

2. As, under § 574, the payment of a less sum where a greater is due, is not a discharge, unless voluntarily accepted as a compromise by the creditor, the section is not in conflict with Art. I, § 10, Const. U. S., in its application to pre-existing contracts. *Ibid.*

3. Laws existing at the date of a contract are deemed part of the contract. Therefore, a compromise, made since § 574 was enacted, is construed as if § 574 had been incorporated in its terms. *Ibid.*

CONSTITUTION U. S.:

As, under § 574, the payment of a less sum where a greater is due, is not a discharge, unless voluntarily accepted as a compromise by the creditor, the section is not in conflict with Art. I, § 10, Const. U. S., in its application to pre-existing contracts. *Koonce* v. *Russell*, 179.

CONSTRUCTION:

Of statutes, not based on policy, 213.

Of conflicting statutes, 356.

CONTRACT:

1. Where the terms of a sale of goods were, that the buyer should give notes for the price, but after the goods were delivered to him the buyer refused to give the notes: *Held*, that no sale was consummated by the delivery—there was only an agreement to sell, which was not perfected, and the seller could recover the goods from the buyer or from one to whom he had assigned them by a general assignment for the benefit of creditors. *Millhiser* v. *Erdmann*, 27.

2. Laws existing at the date of a contract are deemed part of the contract. Therefore, a compromise, made since § 574 was enacted, is construed as if § 574 had been incorporated in its terms. *Koonce* v. *Russell*, 179

3. No peculiar efficacy is given to a married woman's writings under seal, where they are in the nature of executory contracts, as the Courts will in all cases look into the consideration, and if it be such as would sustain an action upon a contract made by a person *sui juris* it will be sufficient. *Flaum* v. *Wallace*, 296.

CONTRIBUTORY NEGLIGENCE: See NEGLIGENCE.

CONVEYANCE, FRAUDULENT: See FRAUD.

CORPORATIONS—MUNICIPAL:

1. When cities and towns are acting (within the purview of their authority) in their *ministerial or corporate character in the management of property* for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipality. But where they are exercising the *judicial, discretionary or legislative authority* conferred by their charters, or are discharging a duty imposed *solely for the public benefit*, they are *not* liable for the negligence of their officers, unless some statute subjects them to liability for such negligence. *Moffitt* v. *Asheville*, 239.

2. Under the Constitution, article 11, § 6, and *The Code*, § 3464, a city is liable in damages only for a failure to so construct its prison, or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things necessary, as to secure to prisoners a reasonable degree of comfort, and protect them from such actual bodily suffering as would injure their health. If the Aldermen of a city comply with the above requirements,

the city is not liable in damages for sickness and suffering endured by a prisoner, and caused by the neglect of the *jailer, policemen or attendants*, to properly minister to his wants and necessities. *Ibid.*

3. The word *superintendence*, as used in the Constitution, article 11, § 6, was intended to impose upon the governing officials of municipal corporations the duty of exercising ordinary care, in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. *Ibid.*

4. Where window-glass in the window of a city prison has been broken and the bed-clothing furnished for its inmates has been destroyed, but the *governing officers* of the city are not shown to have had actual notice thereof, or to have been negligent in providing such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure, in discharging the duties of construction or superintendence of the prison, as to subject the city to liability for injuries sustained by a prisoner by reason of the broken window, &c. *Ibid.*

5. *Semble*, that a city or town would be liable for retaining incompetent or careless jailers or servants, after notice of their character. *Ibid.*

6. *Lewis* v. *City of Raleigh*, *Burch* v. *Edenton*, and *Threadgill* v. *Commissioners*, distinguished from this case and approved. *Ibid.*

7. The rule laid down in *State* v. *Bowman*, 78 N. C., 509, for the examination of expert witnesses, approved. *Ibid.*

8. The charter of a town authorized its commissioners to adopt ordinances and regulations "for the improvement of the streets." The town commissioners passed an ordinance requiring all male citizens, between the ages of eighteen and forty-five years, to work a certain number of days on the streets, and imposing a fine or imprisonment for wilful refusal so to do. *Held*, that such ordinance is valid, and a violation of it was a misdemeanor, within the jurisdiction of the Mayor of the town, under *The Code*, §§ 3818, 3820. *State* v. *Smith*, 403.

9. All towns have the right to enforce such ordinances as the above, unless inconsistent with their charters, by virtue of *The Code*, § §3803, 3827. *Ibid.*

COSTS:

Tender and, under *The Code*, § 573, 266.

COUNSEL:

Comments of, 364.

CRIMINAL COURTS:

1. Under the Constitution, Art. 4, §§ 2 and 30, the Legislature can establish Criminal Courts, and under these sections the Legislature has, by ch. 63, Laws 1885, established a Criminal Court for Mecklenburg County, vested with all the criminal jurisdiction theretofore possessed by the Superior Court of said county. *State* v. *Weddington*, 364.
2. Under ch. 63, Laws 1885, and *The Code*, §§ 196, 198, the Criminal Court of Mecklenburg has jurisdiction to try an indictment for murder removed into that Court from an adjacent county. *Ibid.*
3. In the Superior Court of Union it was ordered that this case be removed to the *Criminal* Court of Mecklenburg for trial, and that the Clerk of Union Superior Court certify the record to the *Superior* Court of Mecklenburg, "to the end that it may be there docketed, and *from there* certified to the Criminal Court," &c., for trial. A certified copy of the record was sent to the Superior Court of Mecklenburg, the Clerk docketed it, and then transmitted the same certified copy to the Clerk of the Criminal Court, attaching to it a certificate that it had been forwarded to him from the Clerk of Union: *Held*, that the record being duly certified, it was not material through how many hands it passed in *transitu*, and the Criminal Court had jurisdiction to try the case. So much of the order of removal as required the docketing of the case in the Superior Court of Mecklenburg was surplusage. *Ibid.*

CROPS:

1. Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had. *Jordan* v. *Bryan*, 59.
2. The landlord cannot bring claim and delivery for the crop before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop. *Ibid.*

3. If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. *Ibid.*

4. Defendant cultivated plaintiff's land on shares during the year 1887; the plaintiff agreed to make, and did make, advances to defendant. The time agreed on when the advances should be due and demandable was *when all the crops were gathered and divided.* There was no agreement as to *the time when the crops should be divided.* Plaintiff and defendant divided the corn, and defendant removed his share thereof. On November 26, 1887, before all the crop was gathered, the plaintiff demanded the crops then gathered, and, upon defendant's refusing to surrender them, brought claim and delivery therefor: *Held*, (1) that the action was prematurely brought, because plaintiff's right to demand his rent and pay for advances did not accrue until the crop was gathered and ready for division; (2) that by dividing the corn the plaintiff waived and lost his lien on defendant's share thereof. *Ibid.*

DAMAGES:

1. H. had a mill on a stream, and L. had a mill lower down on the same stream; both had dams across the stream. H. took out his dam, which caused the accumulated mud, &c., in his pond to fill up L.'s pond to such an extent as to back the water to the injury of H. L. was notified by H. to raise his flood-gates, so as to let the mud pass through when H.'s dam was removed, but L. refused to do so: *Held*, that H. could recover damages from L. caused by the back water, but L. could not recover for damages suffered by the filling up of his pond, because his refusal to open his flood-gates made him guilty of contributory negligence

2. When cities and towns are acting (within the purview of their authority) in their *ministerial or corporate character in the management of property* for their own benefit, or in the exercise of powers assumed voluntarily for their own advantage, they are impliedly liable for damage caused by the negligence of officers or agents subject to their control, although they may be engaged in some work that will inure to the general benefit of the municipalty. But where they are exercising the *judicial, discretionary or legislative authority* conferred by their charters, or are discharging a duty imposed *solely for the public benefit*, they are *not* liable for the negligence of their officers, unless some statute subjects them to liability for such negligence. *Moffitt* v. *Asheville*, 237.

3. In an action to recover damages for the conversion of personal property, the defendant has no right, under *The Code*, § 573, to force the plaintiff to accept the property, for the conversion of which he is sued, or pay costs; nor would defendant have such right in an action of claim and delivery, unless the tender of the property is accompanied by a proposal to pay an amount as damages not less than that ultimately assessed by the jury. *Stevens* v. *Koonce*, 266.

4. Although the allowance of interest, in an action for damages for conversion of property, is discretionary with the jury, yet *after the verdict* the judgment for the damages assessed bears interest by virtue of *The Code*, § 530; and this is so although the verdict is for a certain sum "without interest." *Ibid.*

DECLARATIONS:

Of prisoner in his own favor, 419.

DEED:

1. The deed of a person *non compos* is color of title, and possession under it for seven years ripens into title against those not under disability. *Ellington* v. *Ellington*, 54.

2. A cause of action to set aside a deed executed by one alleged to have been *non compos*, arises immediately upon its execution, and the period within which the action may be brought is prolonged three years after the restoration of reason, or, if he continues insane, a like period for those to whom the estate would have descended. *Ibid.*

3. When one who takes a deed from an alleged lunatic, and goes into the possession of the land described, would have been one of the heirs of the property in the absence of the deed, his possession is adverse, from the delivery of the deed, and the statutory bar of *seven years* is applicable in his favor, against those who would have been tenants in common with him. *Ibid.*

4. A deed of gift, executed in 1790 by W. B. to his son J. B., "during his natural life only, and then to return to the male children of said J. B., lawfully begotten of his body, for the want of such to return to the male children of my other sons, W. and B., their proper use, benefit and behoof of him, them and every of them, and to their heirs and assigns forever," with covenants, &c., vested a life estate in J. B., with remainder in fee to his sons as tenants in common under the act of 1784 (*The Code*, § 1325). *Brown* v. *Ward*, 173.

5. J. B., being such life tenant, devised the lands, with parts of other tracts he owned, to his wife for life, and then to P. B., one of his seven sons, to be by him "enjoyed during his natural

life, without impeachment of waste," and after his death "to the children of my son who may be living at his death, to them and their heirs" *per stirpes*, and P. B. and his mother having taken possession of the lands, conveyed by deed of bargain and sale the land in dispute, with others, to one B. B. in fee with warranty: *Held*, in an action by the children of P. B. against the defendants, who were in possession and claimed through the deed to B. B., that the plaintiffs were entitled to recover. *Ibid.*

6. P. B. having *elected* to take under the will of his father J. B. the full estate for his own life, in the land to which he was entitled to a fractional interest only under the deed of his grandfather, W. B., could not repudiate the will of J. B. in so far as it gave the remainder after his death to his surviving children. *Ibid.*

7. The proof necessary to establish an alleged mistake in a deed should be clear and convincing that a mistake was in fact made in drafting the deed. *Giles* v. *Hunter*, 194.

DEMURRER:

1. In an action for the recovery, as damages, of the price of an article of personal property, which, it was alleged, and proof offered to show, was sold, with other property, to the plaintiff, *all guaranteed to be first-class*, and that the article was returned as not first-class to defendant, by his instructions, and these facts being controverted, and the issues, was the article first-class, and what damages, if any, has plaintiff sustained? *Held*, that instructions to the jury, that if they believed the evidence, the plaintiff was not entitled to recover, would have been *impertinent*, it being the province of the jury to pass upon the issues, and of the Court to determine upon the right of recovery from the facts found. *Baker* v. *Brem*, 72.

2. In such case the proper way to raise the question of plaintiff's right to recover was to demur to the sufficiency of the evidence, as explained in the dissenting opinion in *McCanless* v. *Flinchum*, 98 N. C., 358. *Ibid.*

3. Where all the defendants join in a demurrer to the complaint, upon the ground that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to *any one* of the defendants. *Conant* v. *Barnard*, 315.

4. The same defendants may demur to one and answer as to another of two or more causes of action in one complaint; or, as to a

single cause of action, some defendants may answer and some may demur, and the issues of law will, in either event, be so raised as to require the Court to pass upon them. *Ibid.*

DESCENT:

1. The act of 1879, *The Code*, § 1281, Rule 13, is a valid law as to *descents* after its passage, and renders legitimate the children of *all* colored parents living together as man and wife, born before January 1, 1868—even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. *Woodward* v. *Blue*, 109.

2. But in such cases, during slavery times, when lawful marriage between certain colored persons could not exist, though the fact of cohabiting furnishes presumptive evidence that a child is the issue of the persons thus living together, the fact is open to disproof by any evidence sufficient to overcome the presumption. The same stringent rules as to proof do not prevail as in cases of established legal marriage, where impotency, non-access and the like must be proved to rebut the presumption of legitimacy. *Ibid.*

3. Where the mother of the person claiming to be heir of the decedent, who was a slave at the time of the birth, had testified that she and decedent had been married and cohabited as husband and wife, it was competent to show by another witness that she had often declared that claimant was not decedent's but another named person's child, at least to *impeach* her credit; and there being opposing testimony as to cohabitation about the time of the birth, it was material as to that essential matter. *Ibid.*

DISCRETION OF JUDGE—NEW TRIAL, 53.

DISTURBING RELIGIOUS CONGREGATION:

There were two parties of religious worshipers, each claiming the same church building, and each of whom posted up notices forbidding the other to enter upon the premises. On a certain Sabbath the defendant and his associates took possession, and when the leader of the other party and his associates came up, the defendant, and others aiding him, forbade and prevented their entering the church or worshiping therein. Out of this controversy sprung an indictment of the defendant for disturbing a religious congregation: *Held*, that it was error to exclude evidence, offered on the part of defendant, to show the *bona fides* of his conduct in taking possession of the church. *State* v. *Jacobs*, 397.

DOCKETING JUDGMENTS, 118.

DOWER:

1. In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment, under § 2103 of *The Code*, should not be in part of the lands as if unincumbered or subject to same incumbrance, but in each parcel separately, and then the widow can work out her relief by asserting her equity against each creditor, as he seeks to enforce his security. *Askew* v. *Askew*, 285.

2. Nor, in such case, should the widow be allowed the use for life in a specific sum of money in lieu of dower in a parcel of the mortgaged lands, not deemed susceptible of allotment by metes and bounds, but the allotment should be of one-third, for life, of the premises in value—her share being fixed by law, and not depending on estimates. *Ibid.*

DRUMMERS:

Our statute (ch. 135, § 25, of the Acts of 1887), making it indictable for a "drummer to sell, or attempt to sell, goods," &c., is in contravention of the Constitution of the United States, and void, in so far as it applies to non-resident drummers and all persons non-resident selling in this State. *State* v. *Bracco*, 349.

DUE-BILL:

Larceny of, 344.

EJECTMENT BY TENANT IN COMMON AGAINST CO-TENANT:

If one tenant in common sue his co-tenant for possession, the action will be dismissed if it is shown that plaintiff's rights were not denied, and he had given no reasonable notice to his co-tenant of his demand to be admitted to joint possession; but where the defendant in such an action, by his answer, denies the plaintiff's title, he thereby admits an ouster, and the action lies. *Allen* v. *Sallinger*, 14.

ELECTORS:

1. The oath prescribed for electors by *The Code*, § 2681, omits some of the essential requisites to voting contained in the Constitution, and is confined to those indispensable qualifications set out in Article 6, § 1, of the Constitution. The oath does not extend to disqualification incident upon conviction for crime. *State* v. *Houston*, 383.

2. Under *The Code*, § 2681, the voter swears to his possessing the qualifications of an elector. Under the *The Code*, § 2684, he swears that he has not lost the right to vote by any provision of the Constitution or laws which takes that right from him. *Ibid.*

3. *Therefore*, where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been *convicted* of larceny in 1884, and the judgment suspended on such conviction: *Held*, that the indictment was properly quashed. *Ibid.*

4. Under the Constitution, Article 6, § 1, a person does not forfeit his rights as an elector by a mere verdict of guilty, or a confession, when indicted for a felony, &c.; but, in order that such forfeiture shall attach, such verdict or confession must be followed by a judgment of the Court against the accused. Where one is convicted of a felony, but the judgment is suspended, he does not forfeit his rights as an elector. *Therefore*, the indictment in this case should have been quashed, because it appeared on its face that the judgment was suspended on the "conviction" charged in the bill. *Ibid.*

ENDORSEMENTS:

Oral evidence to explain blank endorsement, 182.

Accommodation endorser, negotiable note, 191.

ENTRY AND GRANT:

1. A grant of lands within the Cherokee Indian boundary is void. *Brown* v. *Brown*, 213.

2. It is the province of the legislative department to prescribe when, how, and for what purpose the lands of the State may be granted. In the absence of such legislation neither the Governor, Secretary of State nor any agency can pass title to State lands by grant or otherwise. *Ibid.*

3. A grant of lands *not subject to grant* is void and can be attacked collaterally. If the land granted *is subject to grant*, but the grant itself was obtained by fraud, or there were irregularities attending its issue, it cannot be attacked *collaterally*. *Ibid.*

4. The treaty of Holston between the United States and the Cherokee Indians did not have the effect to repeal or modify the entry laws of this State. *Ibid.*

5. The statute (Acts 1794, 1 Pot. Rev., ch. 423) amendatory of the statute (Acts 1784, 1 Pot. Rev., ch. 202) rendered the lands acquired by this State by the treaty of Holston from the Cherokee Indians subject to entry and grant. *Brown* v. *Brown*, 221.

ENTRY ON LAND AFTER BEING FORBIDDEN:

1. Upon the trial of an indictment, under *The Code*, § 1120, the defendant can show that he went upon the land in good faith,

claiming or having title thereto. But such claim will not protect him unless he establishes title, or satisfies the jury that he made claim in good faith, and had reasonable ground to believe that his claim was well founded. A mere *belief* that he had a valid claim will not do. *State* v. *Crawley*, 350.

2. The above does not apply in cases of indictment for forcible entry or forcible trespass. *Ibid.*

ESTOPPEL:

1. Where the title to land is put in issue by the pleadings and issues, the verdict and judgment operate as an estoppel on the parties as to the title. *Allen* v. *Sallinger*, 14.

2. Where a judgment debtor has conveyed the tract of land on which he lived to a son, in fraud of creditors, and after judgments were obtained and executions issued against him, other lands, valued at less than $1,000 by the appraisers, and not including that tract, were allotted to him as a homestead, and he made no exception thereto, he was *estopped* from claiming that the homestead should be extended to the land so fraudulently conveyed, and its sale under execution and Sheriff's deed would make a valid title in the purchaser. *Whitehead* v. *Spivey*, 66.

EVIDENCE:

1. The rule governing the *quantum* and quality of proof required to sustain allegations of fraud, undue influence and mistake, in the execution of written instruments, and to establish resulting trusts, is as follows: (1) In cases in which relief is sought on the ground of mutual mistake, mistake of one party and fraud on the part of the other, or that a deed was drawn by mistake an absolute deed, when it was intended as a mortgage or deed of trust, or it is sought to establish a resulting trust, based on a verbal agreement to buy for another, or to set up a lost deed, in all these cases such allegations, of the party seeking the relief, as are necessary to show his right to it *must be established by clear and convincing proof; and evidence dehors the deed and inconsistent with it must be shown.* (2) But where it is sought to have a deed declared void because its execution was obtained by false and fraudulent representations or undue influence, or because it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud *must be proven so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury.* *Harding* v. *Long*, 1.

2. The rule as above stated is perfectly consistent with all of the decisions of this Court. The cases of *Lea* v. *Pearce* and *Ely* v. *Early* are consistent, and both are affirmed. *Ibid.*

3. Where the issue was, whether a deed had been obtained from the bargainor by fraud and undue influence practiced by the bargainees, it was earor to instruct the jury that the bargainor must establish the fraud, &c., by such proof as would satisfy the jury "beyond all reasonable question." *Ibid.*

4. A referee admitted certain evidence, which was objected to, and made his report without ruling on the admissibility of such evidence. In the Superior Court there was an order of re-reference, in which the referee was expressly directed to rule upon the admissibility of the evidence objected to. The referee made another report, without passing on the evidence, and the defendant excepted: *Held*, that it was error to give judgment confirming the report without passing on the objection to the evidence, and that the Judge below could pass upon the competency of the evidence, without again recommitting the case to the referee. *Wallace* v. *Douglass*, 19.

5. When, in an action to foreclose a mortgage on land belonging to a married woman, she alleged that her signature to the mortgage was obtained by fraud of the plaintiff, and fear and compulsion of her said husband, &c., it was competent for the plaintiff to offer a deed executed by the *feme* and her husband, a year after the date of the mortgage, purporting to convey a part of the land embraced in the mortgage, for the purpose of paying a part of the mortgage debt, to rebut the testimony of the *feme* defendant tending to establish the truth of her allegations. *Edwards* v. *Bowden*, 50.

6. An exception to the admission of evidence by a referee, after objection, which is not specific, but is vague and indefinite in form, will not be considered. *Perkins* v. *Berry*, 131.

7. The executors of a deceased member of a firm sued the surviving partners for an account and settlement of the copartnership business. One of the defendants was allowed to testify that plaintiff's testator agreed with witness and the other partners upon a certain basis (which witness stated at length) for the adjustment of the affairs of the firm between the members thereof; and assented to a statement of each partner's interest in the firm, which appeared on the books of the firm: *Held*, that such testimony should have been ruled out upon plaintiff's objection, as it was incompetent under § 590, *The Code*. But the witness had a right to testify that the books

alluded to were kept among the papers of the firm, that decedent had access to them, and that many of the entries were in his handwriting. *Armfield* v. *Colvert*, 147.

8. In the above case, the plaintiffs introduced one of the defendants as a witness, who stated, without objection on the part of the defendants, that plaintiffs' testator contributed a certain sum towards the copartnership capital: *Held*, that plaintiffs did not thereby open the door so as to permit defendants to testify as to other transactions between them and plaintiffs' testator. *Ibid.*

9. Upon a trial before a referee, one of the parties objected to certain testimony as it was given in, but the referee did not then make a note of such objections, but at the end of the written evidence as taken down by him, he noted that the evidence in question had been objected to "in apt time": *Held*, that this was a sufficient noting of the objection, and from it the Court would assume that the objections were made as the evidence was offered. *Ibid.*

10. When a party excepts to a charge of the Judge, that there was no evidence of fraud, the exception should point out the evidence in which it is claimed that fraud appears. Otherwise, the appellate court may disregard it. *Giles* v. *Hunter*, 194.

11. The proof necessary to establish an alleged mistake in a deed should be clear and convincing that a mistake was in fact made in drafting the deed. *Ibid.*

12. A party to a civil action, who has the affirmative of a material issue, must establish his contention by a preponderance of evidence, and proof of notice of an equity is not an exception to the rule. *Ibid.*

13. When a general objection is made, either to the competency of a witness or to the reception of testimony, the party objecting may avail himself of any grounds that may exist in support of his contention, but in the case of testimony, if only part of it is incompetent, the exception will not be entertained if the evidence is severable. *State* v. *Wilkerson*, 337.

14. The Court below may require the grounds of objection to testimony to be stated. If, after being required by the Court to state his objections, a party refuse so to do, his exceptions shall avail him nothing in this Court. *Ibid.*

15. Where the examination of a witness is taken down in writing by a committing Magistrate, and afterwards read in evidence on the trial in the Superior Court, the defendant objecting, and it does not appear from the record and statement of the case on

appeal whether the witness signed the examination or not, it will be presumed in this Court that the witness did sign, and that the Magistrate complied with the duties imposed upon him by the statute. *Ibid.*

16. An indictment for murder charged that the killing was done with a piece of plank, and a witness for the State was allowed to testify (after objection) that he saw deceased wearing a brown wool hat at 4 P. M. before the night of the killing, and on the morning after the killing he found strands of fine brown wool upon a stick which was picked up at the place of the homicide (and with which there was evidence tending to prove the killing was done): *Held*, that the testimony was properly admitted. *State* v. *Weddington*, 364.

17. On such trial, it appearing on cross-examination of the prosecutrix that, the morning after the alleged criminal intercourse with C., she had, before hearing the report from her aunt, written to C. and sent the letter to him ten miles away by a messenger, a further question by the defendant, whether her aunt told her from whom she got the report: *Held*, inadmissible, in the absence of a suggestion as to the purpose for which the inquiry was made. *State* v. *Hinson*, 374.

18. Whether a witness is qualified to testify as an expert, is a question for the Court, and not reviewable; and the value of his testimony as such is for the jury to determine. Therefore, when a physician, upon evidence of his study and practice of his profession, was admitted as an expert to testify, as the result of his examination of the sexual organs of a woman, that she had never copulated with a man, an objection to the testimony, based upon the witness' inexperience as to the effect of such intercourse upon the organs of the female, could not be sustained. *Ibid.*

19. That one acted as a public officer, and was known as such, is *prima facie* evidence of his official character; he is presumed to have been duly qualified, without producing his commission or appointment. *State* v. *McMahan*, 379.

20. The fact of illicit intercourse with others, even when approaching a habit, does not, in the absence of other evidence tending to prove the falsehood of the charge, rebut the presumption given by the statute to the examination of the woman in bastardy proceedings. But it is otherwise, if habitual intercourse with another man, about the time the child must have been begotten, is proven. *State* v. *Giles*, 391.

21. There were two parties of religious worshipers, each claiming the same church building, and each of whom posted up notices forbidding the other to enter upon the premises. On a certain Sabbath the defendant and his associates took possession, and when the leader of the other party and his associates came up, the defendant, and others aiding him, forbade and prevented their entering the church or worshiping therein. Out of this controversy sprung an indictment of the defendant for disturbing a religious congregation: *Held*, that it was error to exclude evidence, offered on the part of defendant, to show the *bona fides* of his conduct in taking possession of the church. *State* v. *Jacobs*, 397.

22. An impeached witness may be supported by showing previous consistent statements made by him. *State* v. *Ward*, 419.

23. Declarations of a prisoner, made after the crime was committed, in excuse or explanation of his acts, will not be received in evidence. Such declarations are competent only when they constitute part of the *res gestæ*. *Ibid.*

24. While *secrecy* is the usual evidence of a felonious intent when one takes the goods of another, it is by no means the only evidence of such intent. *State* v. *Powell*, 424.

Oral evidence, to explain blank indorsement, 182.

EXCEPTION:

1. An exception to the admission of evidence by a referee, after objection, which is not specific, but is vague and indefinite in form, will not be considered. *Perkins* v. *Berry*, 131.

2. That the referee has not reported *all* the evidence taken during the trial before him is not a ground of *exception*. If all the evidence is not sent up, the remedy of the prejudiced party is by application to the Judge for an order directing the referee to send up that which has been omitted. *Ibid.*

EXECUTORS: See ADMINISTRATION.

EXPERTS:

Examination of, 237.

FALSE PRETENCE:

1. The prisoner being entitled to a claim against the county, for witness fees, assigned it to C.; the claim was allowed by the commissioners, who directed the Register of Deeds to issue a county order for it. The prisoner falsely stated to the Register's clerk that he had not assigned his claim, and that he was entitled to the county order, and by means of such false statements

obtained the order. The prisoner being indicted for obtaining property under false pretences, it was proper to charge the jury: That if they believed, beyond a reasonable doubt, that the prisoner fraudulently, designedly, knowingly and falsely represented to the Register's clerk, whether the representations were by words or acts, that he had not assigned his claim to C., and that he was the owner of the order, when, in truth and in fact, he was not, and that by reason thereof he obtained the order from such clerk, he was guilty. *State* v. *Hargrave*, 328.

2. A county is discharged from liability for a witness' fees by paying them to the person who appears to be entitled thereto, from the witness ticket and bill of costs made out by the Clerk of the Court, although the Clerk of the Court had notice that the claim had been assigned by the witness to another person, C. *Therefore*, upon an indictment against the witness for obtaining the county order, issued in payment of his fees, by false pretences, it was proper to charge in the bill that the act was done with intent to defraud C. *Ibid.*

3. An indictment charging that the prisoner obtained goods, &c., from A, by reason of false pretences made to A, with intent to defraud B, will be sustained under our statute, although the relation of principal and agent did not exist between A and B. *Ibid.*

4. Where the prisoner represented that a horse he was about to sell was sound and not lame, and, upon the buyer's remarking that the horse limped, accounted for it as the result of a recent shoeing, and it was shown that the prisoner knew that the horse was diseased: *Held*, that it was proper to refuse to charge that the mere fact that the prosecutor perceived the lameness at the time of the trade entitled the prisoner to a verdict. *State* v. *Wilkerson*, 337.

5. This case distinguished from *State* v. *Young*, 76 N. C., 260, and the rule as to when the doctrine of *caveat emptor* applies, in indictments for false pretence, pointed out. *Ibid.*

6. In an indictment for obtaining money by false pretence the *intent* to defraud is an essential element in the offence, and therefore a special verdict, in which it was not found that the defendant had the *intent* either to defraud or not to defraud, is defective. *State* v. *Oakley*, 508.

FORCIBLE ENTRY:

1. The essential element of the offence of *forcible entry*, under *The Code*, § 1028, is, that the lands, &c., must be in the *actual* possession of him whose possession is charged to have been inter-

fered with, and a bill is defective which fails to charge such a possession. *State* v. *Bryant*, 436.

2. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises. *Ibid.*

3. A charge in the indictment that the prosecutor was "seized in his demesne as of fee," &c., of land, is not sufficient charge of possession under *The Code*, § 1028. *Ibid.*

4. An ineffectual attempt to make such an entry as is forbidden by *The Code*, § 1028, is not punishable under that section, although it might constitute another offence. *Ibid.*

FORM OF CHATTEL MORTGAGE, 207.

FORMER JUDGMENT, 270.

FRAUD:

1. The rule governing the *quantum* and quality of proof required to sustain allegations of fraud, undue influence and mistake, in the execution of written instruments, and to establish resulting trusts, is as follows: (1) In cases in which relief is sought on the ground of mutual mistake, mistake of one party and fraud on the part of the other, or that a deed was drawn by mistake an absolute deed, when it was intended as a mortgage or deed of trust, or it is sought to establish a resulting trust, based on a verbal agreement to buy for another, or to set up a lost deed, in all these cases such allegations, of the party seeking relief, as are necessary to show his right to it, *must be established by clear and convincing proof; and evidence dehors the deed and inconsistent with it must be shown.* (2) But where it is sought to have a deed declared void because its execution was obtained by false and fraudulent representations or undue influence, or because it was executed with intent to hinder, delay, or defeat creditors, the allegations material to establish the fraud *must be proven so as to produce belief of their truth in the minds of the jury, or so as to satisfy the jury of their truth, or to the satisfaction of the jury. Harding* v. *Long*, 1.

2. The rule as above stated is perfectly consistent with all the decisions of this Court. The cases of *Lea* v. *Pearce* and *Ely* v. *Early* are consistent, and both are affirmed. *Ibid.*

3. Where the issue was, whether a deed had been obtained from the bargainor by fraud and undue influence practiced by the bar-

gainees, it was error to instruct the jury that the bargainor must establish the fraud, &c., by such proof as would satisfy the jury "beyond all reasonable question." *Ibid.*

4. Where a judgment debtor has conveyed the tract of land on which he lived to a son, in fraud of creditors, and, after judgments were obtained and executions issued against him, other lands, valued at less than $1,000 by the appraisers, and not including that tract, were allotted to him as a homestead, and he made no exception thereto, he was *estopped* from claiming that the homestead should be extended to the land so fraudulently conveyed, and its sale under execution and Sheriff's deed would make a valid title in the purchaser. *Whitehead* v. *Spivey*, 66.

5. A receipt in full, obtained by a debtor from his creditor by fraud, could have been nullified in an action at law, under the old practice, by a plea and proof of fraud in obtaining it. *Jaffray* v. *Bear*, 165.

6. Therefore, where a debtor obtained a receipt in full from his creditor, upon paying only twenty-five per cent. of the debt, by fraudulent representations, and the creditor sued for the residue of his claim more than three years after his cause of action accrued, but within three years after discovery of the fraud: *Held*, that his action was barred by the statute of limitations. *Ibid.*

Evidence to rebut fraud, 50.

FRAUDULENT CONVEYANCE: See FRAUD.

GRANT: See ENTRY AND GRANT.

HOMESTEAD:

1. Where a judgment debtor has conveyed the tract of land on which he lived to a son, in fraud of creditors, and, after judgments were obtained and executions issued against him, other lands, valued at less than $1,000 by the appraisers, and not including that tract, were allotted to him as a homestead, and he made no exception thereto, he was *estopped* from claiming that the homestead should be extended to the land so fraudulently conveyed, and its sale under execution and Sheriff's deed would make a valid title in the purchaser. *Whitehead* v. *Spivey*, 66.

2. A homestead, whether laid off to a husband in his life-time, or to his widow (there being no children), after his death, cannot be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. *Tucker* v. *Tucker*, 170.

HUSBAND AND WIFE:

1. The act of 1879, *The Code*, § 1281, Rule 13, is a valid law as to *descents* after its passage, and renders legitimate the children of *all* colored parents living together as man and wife, born before January 1, 1868—even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. *Woodward* v. *Blue*, 109.

2. But in such cases, during slavery times, when lawful marriage between certain colored persons could not exist, though the fact of cohabiting furnishes presumptive evidence that a child is the issue of the persons thus living together, the fact is open to disproof by any evidence sufficient to overcome the presumption. The same stringent rules as to proof do not prevail as in cases of established legal marriage, where impotency, non-access and the like must be proved to rebut the presumption of legitimacy. *Ibid.*

3. Where the mother of the person claiming to be heir of the decedent, who was a slave at the time of the birth, had testified that she and decedent had been married and cohabited as husband and wife, it was competent to show by another witness that she had often declared that the claimant was not decedent's but another named person's child, at least to *impeach* her credit; and there being opposing testimony as to cohabitation about the time of the birth, it was material as to that essential matter. *Ibid.*

4. Where a *feme covert* was married and became entitled to real and personal property before the Constitution of 1868, the husband had the right to the personalty on reducing it into possession, and if she allowed the proceeds of sales of the realty to be paid to him it also became his; and if such proceeds were invested, with her consent, in other lands, without request on her part that title should be made to her, and it was made to him, the land vested absolutely in him, discharged of every equity in her. *Giles* v. *Hunter*, 194.

5. A married woman deposited a certain sum of money, being part of her separate property, with W.; afterwards she agreed with W. to leave said sum in his hands as security or collateral for an indebtedness from F. to W.. W. to retain the money until such indebtedness from F. to W. should be reduced to a certain amount. This agreement was in writing, signed and sealed by W. and the married woman and her husband. As part of this transaction W. gave the married woman a note for the sum

deposited by her with him, the note expressing on its face that it was "not transferable," and being payable one day after date. The married woman and her husband sued W. on the note before the terms of the above-mentioned agreement had been complied with: *Held*, that they could not recover. *Flaum* v. *Wallace*, 296.

6. The principles declared in *Pippen* v. *Wesson*, and approved in *Dougherty* v. *Sprinkle*, establish the proposition, that whenever, under the laws in force prior to the Constitution of 1868, a *feme covert*, in the absence of any special provisions in the deed of settlement, could, with the consent of her trustee, bind her equitable separate estate, she may *now*, with the written consent of her husband, bind her statutory separate estate. Where the case falls within the exceptions mentioned in *The Code*, § 1826, the consent of the husband is not required. *Ibid.*

7. Under the present Constitution and laws of this State a married woman may, with the written consent of her husband, *expressly* charge her statutory separate *personal* estate by her engagements in the nature of executory contracts, although the consideration for such engagements does not inure to her benefit, or to that of her separate estate. The intent to so charge must, in such cases, appear in the instrument creating the liability, but it is not necessary that *specific* property be charged. *Ibid.*

IDIOTS:

Deeds by, color of title, 54.

INDICTMENT:

1. Every indictment should charge *all* the essential elements of the offence intended to be charged; and when the *intent* with which an act is committed is one of the essential elements of the offence, the word "*intent*" should be used in the indictment, though possibly some equivalent expression would suffice in its stead. *State* v. *Golston*, 323.

2. An indictment charging that the defendant did make an assault upon a female child under ten years of age, and did unlawfully *attempt* to carnally know her, &c., does not sufficiently charge an assault with intent to commit a rape, &c., under § 1102 of *The Code*. *Ibid.*

3. But such indictment sufficiently charges, and the defendant could be convicted of, a simple assault. *Ibid.*

4. An assault with intent to commit rape being a misdemeanor, in an indictment for the offence the defendant may be convicted on a single count of a simple assault; but it would be otherwise if the offence charged were a felony. *Ibid.*

5. An indictment charging that the prisoner obtained goods, &c., from A, by reason of false pretences made to A, with intent to defraud B, will be sustained under our statute, although the relation of principal and agent did not exist between A and B. *State* v. *Hargrave*, 328.

6. This case distinguished from *State* v. *Young*, 76 N. C., 260, and the rule as to when the doctrine of *caveat emptor* applies, in indictments for false pretence, pointed out. *State* v. *Wilkerson*, 337.

7. While a "due-bill" is not a promissory note, and negotiable by indorsement, it is within the meaning of the words, "or other obligation," in § 1064 of *The Code*. The larceny of such a paper is indictable under that section. *State* v. *Campbell*, 344.

8. But if such "due-bill" had been paid before the alleged felonious taking, an indictment for such taking cannot be sustained under said section; however, it might possibly have been, if the indictment had contained a count charging the larceny of a piece of paper on which the due-bill was written. *Ibid.*

9. Our statute (ch. 135, § 25, of the Acts of 1887), making it indictable for a "drummer to sell, or attempt to sell, goods," &c., is in contravention of the Constitution of the United States, and void, in so far as it applies to non-resident drummers and all persons non-resident selling in this State. *State* v. *Bracco*, 349.

10. Upon the trial of an indictment, under *The Code*, § 1120, the defendant can show that he went upon the land in good faith, claiming or having title thereto. But such claim will not protect him unless he establishes title, or satisfies the jury that he made claim in good faith, and had reasonable ground to believe that his claim was well founded. A mere *belief* that he had a valid claim will not do. *State* v. *Crawley*, 353.

11. The above does not apply in cases of indictment for forcible entry or forcible trespass. *Ibid.*

12. Chapter 66, Laws 1885, amending *The Code*, § 985 (6), being without any saving clause, has the effect of discharging all who had been previously guilty of violations of said section, except those against whom an indictment could be sustained and judgment pronounced under said section without the aid of the words stricken out of it by the act of 1885. *State* v. *Massey*, 356.

13. *The Code*, § 3766, does not serve the purpose of a saving clause to ch. 66, Laws 1885. That section only applies where an amendatory law repeals a proviso to a section of a former act,

or a whole section to a former act, and the section without the proviso, or the section not affected, will support an indictment. *Ibid.*

14. An indictment for murder charged that the killing was done with a piece of plank, and a witness for the State was allowed to testify (after objection) that he saw deceased wearing a brown wool hat at 4 P. M. before the night of the killing, and on the morning after the killing he found strands of fine brown wool upon a stick which was picked up at the place of the homicide (and with which there was evidence tending to prove the killing was done): *Held*, that the testimony was properly admitted. *State* v. *Weddington*, 364.

15. If an indictment for murder charge that the killing was done with a piece of plank, and the proof is that it was done with a piece of iron, the variance is not necessarily fatal. The rule on this subject laid down in *State* v. *Gould*, 90 N. C., 658, is correct. *Ibid.*

16. In an indictment for slandering an innocent woman, under § 1113 of *The Code*, the defendant cannot show, on the plea of not guilty, a prevalent report of sexual intimacy between the prosecutrix and one C., the making of a charge of such intimacy being the defamatory matter specified in the indictment, to disprove its wanton and malicious utterance, though he might make such proof, after verdict of guilty, to the Court in extenuation, &c. *State* v. *Hinson*, 374.

17. A woman who has never had actual sexual intercourse with any one is an *innocent woman*, within the meaning of § 1113 of *The Code*, even though she and a man were surprised in each other's embrace, about to commit the act of copulation, but before it took place. *Ibid.*

18. Where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a qualified voter, he having been *convicted* of larceny in 1884, and the judgment suspended on such conviction: *Held*, that the indictment was properly quashed. *State* v. *Houston*, 383.

19. Under the Constitution, Article 6, § 1, a person does not forfeit his rights as an elector by a mere verdict of guilty, or a confession, when indicted for a felony, &c.; but in order that such forfeiture shall attach, such verdict or confession must be followed by a judgment of the Court against the accused. Where one is convicted of a felony, but the judgment is suspended, he does

not forfeit his rights as an elector. *Therefore*, the indictment in this case should have been quashed, because it appeared on its face that the judgment was suspended on the "conviction" charged in the bill. *Ibid.*

20. In an indictment for obtaining money by false pretence, the *intent* to defraud is an essential element in the offence, and therefore a special verdict, in which it was not found that the defendant had the *intent* either to defraud or not to defraud, is defective. *State* v. *Oakley*, 408.

21. Where a father sent his minor son to buy whiskey, for his (the father's) use, and the dealer delivered the whiskey to the son, knowing it was for the father: *Held*, that the seller was not guilty of selling to a minor, under § 1077 of *The Code*. *State* v. *Walker*, 413.

22. Upon an indictment for burglary it is competent for the State to show acts and conversations of the defendant which tend to fix him with a knowledge of the location of the premises, and the condition and circumstances of the prosecutor. *State* v. *Ward*, 419.

23. The ownership of property stolen can be charged in an indictment for larceny as being in a bailee. *State* v. *Powell*, 424.

24. A bill of indictment charging A with larceny, and containing a count against B for aiding, &c., will be sustained, it not being shown how A was prejudiced thereby. *Ibid.*

25. Where A had meat in his possession—in his own smoke-house—keeping it for B, who lived with him, the property may be laid in A in an indictment for larceny. *State* v. *Allen*, 433.

26. The essential element of the offence of *forcible entry*, under *The Code*, § 1028, is, that the lands, &c., must be in the *actual* possession of him whose possession is charged to have been interfered with, and a bill is defective which fails to charge such a possession. *State* v. *Bryant*, 436.

27. To constitute actual possession, there must be an actual exercise of authority and control over the land, either in person or by the family or servants of the person alleged to be in possession. He need not at all times be personally present on the premises. *Ibid.*

28. A charge in the indictment that the prosecutor was "seized in his demesne as of fee," &c., of land, is not a sufficient charge of possession under *The Code*, § 1028. *Ibid.*

29. An ineffectual attempt to make such an entry as is forbidden by *The Code*, § 1028, is not punishable under that section, although it might constitute another offence.

INJUNCTION:

Authority over streams, conferred upon County Commissioners by ch. 56, vol. 2, *The Code*, while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream, when he is proceeding under the permit and direction of the Commissioners. *McLaughlin* v. *Mfg. Co.*, 100.

INSANITY:

1. In an action of ejectment defendant relied upon adverse possession and the statute of limitations. Plaintiff relied upon the insanity of his ancestor, against whom the land was held adversely, to rebut the plea of the statute. On the question of insanity the Court charged the jury, that if the alleged insane person was so mentally diseased that he was unable to understand and assert his rights, that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in possession thereof asserting title thereto, and that such possession would destroy his rights, then he labored under such disability as would prevent the operation of the statute: *Held*, that the charge contained nothing of which plaintiff could complain. *Warlick* v. *Plonk*, 81.

2. If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their right to recover will be barred. Revised Code, ch. 65, § 1; *The Code*, §§ 148, 163.

Deed by person *non compos*, color of title, 54.

INTEREST:

Although the allowance of interest, in an action for damages for conversion of property, is discretionary with the jury, yet *after the verdict* the judgment for the damages assessed bears interest by virtue of *The Code*, § 530; and this is so, although the verdict is for a certain sum "without interest." *Stephens* v. *Koonce*, 266.

ISSUES:

1. Plaintiff claimed title to the whole of a tract of land of which he alleged that defendant was in possession; defendant denied being in possession of any land belonging to plaintiff. One of

the issues submitted to the jury was: "Is plaintiff the owner of the land described in complaint?" To which the jury responded: "Yes: one-seventh of the Sandy Bottom tract—160 acres." The jury also found in response to another issue, that defendant was in possession of the land: *Held*, (1) that an objection by the defendant, that the finding of the jury on the first issue was not responsive, was not tenable; (2) that a judgment that plaintiff recover the whole land was erroneous; the judgment should have been that plaintiff recover, and be let into possession with defendant as tenant in common, to the extent of a one-seventh interest. *Allen* v. *Salinger*, 14.

2. Whether a writing, claimed to be a mortgage, is such or not, is a question of law, and should not be submitted to a jury. *Comron* v. *Standland*, 207.

3. If a question of law is improperly submitted to a jury, but the verdict finds it correctly, no harm is done and no exception lies. *Ibid.*

4. A special verdict should find all the facts material to the determination of the issues raised by the pleadings, and if it fails to find any material fact it should be set aside and a new trial ordered. *State* v. *Oakley*, 408.

JOINDER OF PARTIES:

It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with the assent of the other. *Perkins* v. *Berry*, 131.

JUDGE:

Granting a new trial, on the ground that the verdict is against the weight of the evidence, is a matter within the discretion of the Judge below, and not reviewable, unless it appear that the Judge was influenced in the exercise of such power by an erroneous view of the law. *Davenport* v. *Terrell*, 53.

JUDGE'S CHARGE:

1. In an action for the recovery, as damages, of the price of an article of personal property, which, it was alleged, and proof offered to show, was sold, with other property, to the plaintiff, *all guaranteed to be first-class*, and that the article was returned as not first-class to defendant, by his instructions, and these facts being controverted, and the issues, was the article first-class, and what damages, if any, has plaintiff sustained? *Held*, that instructions to the jury, that if they believed the evidence, the plaintiff was not entitled to recover, would have been

impertinent, it being the province of the jury to pass upon the issues, and of the Court to determine upon the right of recovery from the facts found. *Baker* v. *Brem*, 72.

2. It was proper to instruct the jury, that if the article was returned to the defendant as unfit for its intended uses, under his instructions, it was a rescission *pro tanto* of the contract, and plaintiff was entitled to recover the amount he had agreed to pay for the same, it appearing that his note covering the amount had been assigned, before maturity, to an innocent third party. *Ibid.*

3. In an action of ejectment defendant relied upon adverse possession and the statute of limitations. Plaintiff relied upon the insanity of his ancestor, against whom the land was held adversely, to rebut the plea of the statute. On the question of insanity the Court charged the jury, that if the alleged insane person was so mentally diseased that he was unable to understand and assert his rights, that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in possession thereof asserting title thereto, and that such possession would destroy his rights, then he labored under such disability as would prevent the operation of the statute: *Held*, that the charge contained nothing of which plaintiff could complain. *Warlick* v. *Plonk*, 81.

4. The Judge said to a hung jury, that it was their duty to agree if possible; that no juror, from mere pride of opinion, should refuse to agree, but he was not required to surrender conscientious views founded on evidence; that it was the privilege and duty of each juror to reason with his fellows concerning the facts in the case, with an honest desire to arrive at the truth and a verdict: *Held*, that such charge was free from objection. *Ibid.*

5. If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their right to recover will be barred. Revised Code, ch. 65, § 1; *The Code*, §§ 148, 163. *Ibid.*

6. If improper evidence is admitted after objection, but the ill effect which it might have is obviated by the Judge's charge, a new trial will not be ordered in this Court. *Hardin* v. *Ledbetter*, 90.

7. No instruction, terminating in telling the jury the plaintiff cannot recover, is in form to meet the issues of fact, nor should it be given. *Ibid.*

8. When a party excepts to a charge of the Judge, that there was no evidence of fraud, the exception should point out the evidence in which it is claimed that fraud appears. Otherwise, the appellate court may disregard it. *Giles* v. *Hunter*, 194.

9. The prisoner being entitled to a claim against the county, for witness fees, assigned it to C.; the claim was allowed by the Commissioners, who directed the Register of Deeds to issue a county order for it. The prisoner falsely stated to the Register's clerk that he had not assigned his claim, and that he was entitled to the county order, and by means of such false statements obtained the order. The prisoner being indicted for obtaining property under false pretences, it was proper to charge the jury: That if they believed, beyond a reasonable doubt, that the prisoner fraudulently, designedly, knowingly and falsely represented to the Register's clerk, whether the representations were by words or acts, that he had not assigned his claim to C., and that he was the owner of the order, when, in truth and in fact, he was not, and that by reason thereof he obtained the order from such clerk, he was guilty. *State* v. *Hargrave*, 328.

10. Where the prisoner represented that a horse he was about to sell was sound and not lame, and, upon the buyer's remarking that the horse limped, accounted for it as the result of a recent shoeing, and it was shown that the prisoner knew that the horse was diseased: *Held*, that it was proper to refuse to charge that the mere fact that the prosecutor perceived the lameness at the time of the trade entitled the prisoner to a verdict. *State* v. *Wilkerson*, 337.

11. Prosecutor dropped some money and the prisoner caught it up. Prosecutor asked for the money, whereupon prisoner said: "Oh, hell! You ain't going to get this money." Prosecutor started toward prisoner and prisoner put his hand to his breast and threatened to kill prosecutor if he followed him: *Held*, that it was proper to instruct the jury, that it was for them to say whether the taking of the money was with a felonious intent or not. *State* v. *Powell*, 424.

12. Where the evidence is circumstantial, the accused is not entitled to a charge, that it must be as conclusive as if an "eye-witness" had testified to the fact. *State* v. *Allen*, 433.

JUDGMENT:

1. A judgment is not a lien upon land, in the absence of the actual levy of an execution, until it is docketed in the county where the land is situate, in the manner prescribed by § 433 of *The*

Code, and upon the docket required to be kept by § 83 of *The Code*. *Holman* v. *Miller*, 118.

2. It is the duty of a judgment creditor to see that his judgment is properly docketed. If the Clerk neglects to docket the judgment, subsequent incumbrances and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the Clerk for loss suffered by reason of the failure to docket the judgment. *Ibid.*

3. Where a judgment absolute is rendered against executors, fixing them with assets, and they pay it, their personal representatives cannot afterwards recover the amount thus paid out of the estate of their testator. *Perkins* v. *Berry*, 131.

4. The issue of execution every three years on a judgment against executors will repel the bar of the statute of limitations. *Ibid.*

5. Where, in an action brought on a note given, with surety, by a distributee of an estate to the administrator, it was adjudged that the administrator recover the amount of the note, but that no execution issue until the Clerk should determine the amount of the distributive share of the principal debtor in the estate on the final accounts of the same, and such amount should be credited before issuing of execution: *Held*, that it was competent for the Court, at a subsequent term, upon a report of the Clerk, in this action, that nothing was due on the distributive share, and there being no exception, to modify the judgment and order execution to issue, notwithstanding that in proceedings by the administrator against the distributees for a final settlement, in which there was a report of the Clerk that nothing was due on said distributive share, and an appeal from a judgment confirming the report. *Scroggs* v. *Alexander*, 162.

JUDGMENTS:

Bear interest under *The Code*, § 530, 266.

JURY:

Instructions to hung jury, 81.

Questions of law, improperly submitted to, 207.

Allowance of interest, when discretionary with, 266.

JUSTICE OF THE PEACE:

1. *The Code*, §§ 117–130, has no application in Courts of Justices of the Peace. *Comron* v. *Standland*, 207.

2. There is no statutory provision that allows a mortgage of real or personal property to be given *in lieu* of the undertaking on appeal from a Justice's judgment, required by *The Code*, §§ 883, 884. *Ibid.*

3. Although neither the Justice nor the plaintiff is required to accept a mortgage from the defendant *in lieu* of an undertaking on appeal, yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. *Ibid.*

4. A writing was entitled "A v. B: Undertaking on appeal from Justice's judgment": it recited a judgment rendered against B, in favor of A, and the intention of B to appeal therefrom, and then provided as follows: "Now, therefore, for the purpose of securing the payment of all damages and costs which may be awarded against him, and so much of the judgment or any part thereof that may be affirmed, the said B does give the following articles of personal property" (describing the property). The writing was signed by B, but not sealed: *Held*, to be good as a chattel mortgage. *Ibid.*

5. Under the present practice a memorandum, "general issue," entered on a Justice's docket as embracing defendant's defence, will be construed to mean nothing more than a general denial of plaintiff's cause or causes of action; hence, evidence of an estoppel by judgment, or of another action pending, is not admissible in support of such a defence. *Blackwell* v. *Dibbrell*, 270.

6. The objection, that a cause of action is not such as can be "split up" so as to bring it within the jurisdiction of a Justice, must be made before the Justice; otherwise it cannot be made in the Superior Court on appeal, unless the defendant is permitted to amend. *Ibid.*

JURISDICTION:

1. A brought an action of claim and delivery before a Justice of the Peace, and took the property from the defendant under the process of that Court. Upon the trial, the Justice ruled that he had no jurisdiction, made an order of restitution, and gave judgment in favor of the defendant for $150, as the value of the property in dispute, to be collected in the event the property was not restored. A then brought an action in the Superior Court to restrain the collection of the judgment for $150. A restraining order was denied him, and he paid the $150. Afterwards the Judge permitted A to amend his complaint so as to set up the payment of the $150, and demand judgment for same: *Held*, (1) that denial of restraining order was proper; (2) that as the $150 was not paid until after the action was brought, it was error to allow the amendment; (3) that the allowance of

such amendment was also erroneous because it changed the action and made it substantially a new one; (4) that the demand for the $150 sounded in contract, and therefore the Superior Court had no jurisdiction of an action to recover it. *Powell* v. *Allen*, 46.

2. Under the Constitution, Art. 4, §§ 2 and 30, the Legislature can establish Criminal Courts, and under these sections the Legislature has, by ch. 63, Laws 1885, established a Criminal Court for Mecklenburg County, vested with all the criminal jurisdiction theretofore possessed by the Superior Court of said county. *State* v. *Weddington*, 364.

3. Under ch. 63, Laws 1885, and *The Code*, §§ 196, 198, the Criminal Court of Mecklenburg has jurisdiction to try an indictment for murder removed into that Court from an adjacent county. *Ibid.*

4. In the Superior Court of Union it was ordered that this case be removed to the *Criminal* Court of Mecklenburg for trial, and that the Clerk of Union Superior Court certify the record to the *Superior* Court of Mecklenburg, "to the end that it may be there docketed, and *from there* certified to the Criminal Court," &c., for trial. A certified copy of the record was sent to the Superior Court of Mecklenburg, the Clerk docketed it, and then transmitted the same certified copy to the Clerk of the Criminal Court, attaching to it a certificate that it had been forwarded to him from the Clerk of Union: *Held*, that the record being duly certified, it was not material through how many hands it passed in *transitu*, and the Criminal Court had jurisdiction to try the case. So much of the order of removal as required the docketing of the case in the Superior Court of Mecklenburg was surplusage. *Ibid.*

5. A former proceeding in bastardy, which was dismissed for want of jurisdiction, is no bar to a second proceeding based upon the same charge. *State* v. *Giles*, 391.

LANDLORD AND TENANT:

1. Though the constructive possession of the crop is vested by statute in the landlord, yet, during the cultivation, and for all purposes of making and gathering the crop, the actual possession is in the tenant until the rent and advances become due, or a division can be had. *Jordan* v. *Bryan*, 59.

2. The landlord cannot bring claim and delivery for the crop before the time fixed for division, unless the tenant is about to remove or dispose of the crop, or abandon a growing crop. *Ibid.*

3. If the tenant, at any time before satisfying the landlord's liens for rent and advances, removes the crop, or any part of it, he becomes liable civilly and criminally. *Ibid.*

4. Defendant cultivated plaintiff's land on shares during the year 1887; the plaintiff agreed to make, and did make, advances to defendant. The time agreed on when the advances should be due and demandable was *when all the crops were gathered and divided.* There was no agreement as to *the time when the crops should be divided.* Plaintiff and defendant divided the corn, and defendant removed his share thereof. On November 26, 1887, before all the crop was gathered, the plaintiff demanded the crops then gathered, and, upon defendant's refusing to surrender them, brought claim and delivery therefor: *Held*, (1) that the action was prematurely brought, because plaintiff's right to demand his rent and pay for advances did not accrue until the crop was gathered and ready for division; (2) that by dividing the corn the plaintiff waived and lost his lien on defendant's share thereof. *Ibid.*

LARCENY:

1. While a "due-bill" is not a promissory note, and negotiable by indorsement, it is within the meaning of the words, "or other obligation," in § 1064 of *The Code.* The larceny of such a paper is indictable under that section. *State* v. *Campbell*, 344.

2. But if such "due-bill" had been paid before the alleged felonious taking, an indictment for such taking cannot be sustained under said section; however, it might possibly have been, if the indictment had contained a count charging the larceny of a piece of paper on which the due-bill was written. *Ibid.*

3. While *secrecy* is the usual evidence of a felonious intent when one takes the goods of another, it is by no means the only evidence of such intent. *State* v. *Powell*, 424.

4. Prosecutor dropped some money and the prisoner caught it up. Prosecutor asked for the money, whereupon prisoner said: "Oh, hell! You ain't going to get this money." Prosecutor started toward prisoner, and prisoner put his hand to his breast and threatened to kill prosecutor if he followed him: *Held*, that it was proper to instruct the jury, that it was for them to say whether the taking of the money was with a felonious intent or not. *Ibid.*

5. The ownership of property stolen can be charged in an indictment for larceny as being in a bailee. *Ibid.*

6. A bill of indictment charging A with larceny, and containing a count against B for aiding, &c., will be sustained, it not being shown how A was prejudiced thereby. *Ibid.*

7. Where A had meat in his possession—in his own smoke-house—keeping it for B, who lived with him, the property may be laid in A in an indictment for larceny. *State* v. *Allen*, 433.

8. Where the evidence is circumstantial, the accused is not entitled to a charge, that it must be as conclusive as if an "eye-witness" had testified to the fact. *Ibid.*

9. A general verdict of guilty on an indictment containing two counts, one for larceny, the other for receiving, is valid, although the jury were instructed to return a verdict of "guilty on the *second* count," if satisfied, &c., from the evidence on the part of the State. *Ibid.*

LEGISLATIVE CONTROL OVER PUBLIC LANDS, 213.

LIABILITY:

Of firm for goods sold one member thereof, 86.

Of indorsers of notes, between themselves, 182.

Of sureties on defendant's undertaking in "claim and delivery," 276.

LIEN:

1. A judgment is not a lien upon land, in the absence of the actual levy of an execution, until it is docketed in the county where the land is situate, in the manner prescribed by § 433 of *The Code*, and upon the docket required to be kept by § 83 of *The Code*. *Holman* v. *Miller*, 118.

2. It is the duty of a judgment creditor to see that his judgment is properly docketed. If the Clerk neglects to docket the judgment, subsequent incumbrances and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the Clerk for loss suffered by reason of the failure to docket the judgment. *Ibid.*

LIEN OF LANDLORD, 59.

LIMITATIONS, STATUTE OF:

1. Possession by the bargainee, open, continued and adverse, of part of a tract of land covered by deed, is possession of all of the tract not occupied by some one else, and such possession, continued for seven years, will ripen into title. *Allen* v. *Salinger*, 14.

2. The indulgence of a debtor by the creditor, at the special request of the debtor, will not prevent the running of the statute of limitations. To prevent the statute's being a bar, there must be an *agreement*, express or implied, on the part of the debtor, that he will not plead the statute. *Hill* v. *Hilliard*, 34.

3. A subsequent mortgagee, or purchaser of the equity of redemption, has the right to avail himself of the statute of limitations as a defence to the first mortgage, and after the rights of the first mortgagee, are barred by the statute, no act or acknowledgment on the part of the mortgagor can revive the mortgage as to subsequent mortgagees or purchasers. *Ibid.*

4. A subsequent mortgagee. or purchaser of the equity of redemption, can avail himself of the protection of the statute of limitations against a prior mortgagee, although the mortgagor is a party to the action and refuses to plead the statute. *Ibid.*

5. The deed of a person *non compos* is color of title, and possession under it for seven years ripens into title against those not under disability. *Ellington* v. *Ellington*, 54

6. A cause of action, to set aside a deed executed by one alleged to have been *non compos*, arises immediately upon its execution, and the period within which the action may be brought is prolonged three years after the restoration of reason, or, if he continues insane, a like period for those to whom the estate would have descended. *Ibid.*

7. When one takes a deed from an alleged lunatic, and goes into the possession of the land described, would have been one of the heirs of the property in the absence of the deed, his possession is adverse, from the delivery of the deed, and the statutory bar of *seven years* is applicable in his favor, against those who would have been tenants in common with him. *Ibid.*

8. In an action of ejectment defendant relied upon adverse possession and the statute of limitations. Plaintiff relied upon the insanity of his ancestor, against whom the land was held adversely, to rebut the plea of the statute. On the question of insanity the Court charged the jury, that if the alleged insane person was so mentally diseased that he was unable to understand and assert his rights, that he did not possess sufficient mental capacity to know that he was the owner of the land, and that the defendant was in possession thereof asserting title thereto, and that such possession would destroy his rights, then he labored under such disability as would prevent the operation of the statute: *Held*, that the charge contained nothing of which plaintiff could complain. *Warlick* v. *Plonk*, 81.

9. If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within

three years after disability of insanity is removed, else their right to recover will be barred. Revised Code, ch. 65, § 1; *The Co le.* §§ 148, 163. *Ibid.*

10. The issue of execution every three years on a judgment against executors will repel the bar of the statute of limitations. *Perkins* v. *Berry*, 131.

11. When the statute of limitations commences to run against the ancestor or devisor, it continues to run against the heir or devisee, even though the right of action may, on the next day after it accrues, pass from the ancestor or devisor to an heir cr devisee under disability. *Chancey* v. *Powell*, 159.

12. Defendants entered into adverse possession of land in 1856, in the life-time of plaintiffs' ancestor, and held such possession up to the commencement of this action, in 1887. Plaintiffs' ancestor died in 1862, at which time plaintiffs were under disabilities, and they have remained under disabilities all the time: *Held*, that plaintiffs are barred by the statute. The suspension of the statute from May, 1861, to January, 1870, does not place plaintiffs on the same footing as if the statute had been *repealed* in 1861, and, therefore, only *commenced to run* in 1870, after the death of their ancestor, and while they were under disabilities; but plaintiffs stand in the same position as would their ancestor, if living. *Ibid.*

13. Subsection 9, § 155, of *The Code*, applies to actions *solely cognizable* in the courts of equity, under the practice prior to C. C. P. It does not apply to actions of which the courts of law and equity had concurrent jurisdiction. *Jaffray* v. *Bear*, 165.

14. A receipt in full, obtained by a debtor from his creditor by fraud, could have been nullified in an action at law, under the old practice, by a plea and proof of fraud in obtaining it. Therefore, where a debtor obtained a receipt in full from his creditor, upon paying only twenty-five per cent. of the debt, by fraudulent representations, and the creditor sued for the residue of his claim more than three years after his cause of action accrued, but within three years after discovery of the fraud: *Held*, that his action was barred by the statute of limitations. *Ibid.*

15. The act of 1889, amending § 155 (9) of *The Code*, does not apply to this case. *Ibid.*

16. If the statute of limitations commences to run, nothing stops it. When it begins to run against the ancestor, it continues to run against the heir, although the heir is under disability when the descent is cast. *Frederick* v. *Williams*, 189.

17. There is nothing in § 148, *The Code*, which changes the law as it formerly existed. *Ibid.*

18. Mortgagee sold the mortgaged land, bought it himself, and entered into adverse possession in the life-time of mortgagor, *i. e.*, on January 1, 1874; which adverse possession has continued ever since. Mortgagor died January 1, 1883; there has never been any administration on his estate; in June, 1887, his *infant* heirs sued the mortgagee for redemption: *Held*, that the action is barred under *The Code*, §§ 152 (4), 148 and 168. *Ibid.*

19. Where a mortgagee takes adverse possession of and rents out the mortgaged land, the payment of rents to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption. *Ibid.*

LIQUORS, SALE OF, TO MINOR:

Where a father sent his minor son to buy whiskey, for his (the father's) use, and the dealer delivered the whiskey to the son, knowing it was for the father: *Held*, that the seller was not guilty of selling to a minor, under § 1077 of *The Code*. *State* v. *Walker*, 413.

LUNATICS—DEEDS OF, COLOR OF TITLE, 54.

MARRIAGE:

1. The act of 1879, *The Code*, § 1281, Rule 13, is a valid law as to *descents* after its passage, and renders legitimate the children of *all* colored parents living together as man and wife, born before January 1, 1868—even the children of a woman of mixed blood, whose mother was a white woman, who lived with a slave as his wife at the time of their birth. *Woodward* v. *Blue*, 109.

2. But in such cases, during slavery times, when lawful marriage between certain colored persons could not exist, though the fact of cohabiting furnishes presumptive evidence that a child is the issue of the persons thus living together, the fact is open to disproof by any evidence sufficient to overcome the presumption. The same stringent rules as to proof do not prevail as in cases of established legal marriage, where impotency, non-access and the like must be proved to rebut the presumption of legitimacy. *Ibid.*

3. Where the mother of the person claiming to be heir of the decedent, who was a slave at the time of the birth, had testified that she and decedent had been married and cohabited as husband and wife, it was competent to show by another witness that she had often declared that the claimant was not dece-

dent's but another named person's child, at least to *impeach* her credit; and there being opposing testimony as to cohabitation about the time of the birth, it was material as to that essential matter. *Ibid.*

MARRIED WOMEN:

1. When, in an action to foreclose a mortgage on land belonging to a married woman, she alleges that her signature to the mortgage was obtained by fraud of the plaintiff, and fear and compulsion of her said husband, &c.. it was competent for the plaintiff to offer a deed executed by the *feme* and her husband, a year after the date of the mortgage, purporting to convey a part of the land embraced in the mortgage, for the purpose of paying a part of the mortgage debt, to rebut the testimony of the *feme* defendant tending to establish the truth of her allegations. *Edwards* v. *Bowden*, 50.

2. Where a *feme covert* was married and became entitled to real and personal property before the Constitution of 1868, the husband had the right to the personalty on reducing it into possession, and if she allowed the proceeds of sales of the realty to be paid to him it also became his; and if such proceeds were invested, with her consent, in other lands, without request on her part that title should be made to her, and it was made to him, the land vested absolutely in him, discharged of every equity in her. *Giles* v. *Hunter*, 194.

3. A married woman deposited a certain sum of money, being part of her separate property, with W.; afterwards she agreed with W. to leave said sum in his hands as security or collateral for an indebtedness from F. to W., W. to retain the money until such indebtedness from F. to W. should be reduced to a certain amount. This agreement was in writing, signed and sealed by W. and the married woman and her husband. As part of this transaction W. gave the married woman a note for the sum deposited by her with him, the note expressing on its face that it was "not transferable," and being payable one day after date. The married woman and her husband sued W. on the note before the terms of the above-mentioned agreement had been complied with: *Held*, that they could not recover. *Flaum* v. *Wallace*, 296.

4. The principles declared in *Pippen* v. *Wesson*, and approved in *Dougherty* v. *Sprinkle*, establish the proposition, that whenever, under the laws in force prior to the Constitution of 1868, a *feme covert*, in the absence of any special provisions in the deed of settlement, could, with the consent of her trustee, bind her

equitable separate estate, she may *now*, with the written consent of her husband, bind her statutory separate estate. Where the case falls within the exceptions mentioned in *The Code*, § 1826, the consent of the husband is not required. *Ibid.*

5. Under the present Constitution and laws of this State a married woman may, with the written consent of her husband, *expressly* charge her statutory separate *personal* estate by her engagements in the nature of executory contracts, although the consideration for such engagements does not inure to her benefit, or to that of her separate estate. The intent to so charge must in such cases appear in the instrument creating the liability, but it is not necessary that *specific* property be charged. *Ibid.*

6. A married woman may, with the concurrence of the trustee, where such concurrence is required, charge her equitable separate estate to the extent of the power of disposition conferred by the deed of settlement. Of course, where there are limitations, or other special provisions. these must be strictly pursued. *Ibid.*

7. Whether a married woman's engagements can, under any circumstances, bind her separate *real* estate, in the absence of a *specific* charge by way of mortgage or other conveyance, is an open question still, as it does not arise in this case, and was not passed upon in *Arrington* v. *Bell*, 94 N. C., 248. *Ibid.*

8. No peculiar efficacy is given to a married woman's writings under seal, where they are in the nature of executory contracts, as the Courts will in all cases look into the consideration, and if it be such as would sustain an action upon a contract made by a person *sui juris* it will be sufficient. *Ibid.*

9. The complaint, in an action to enforce an executory contract of a married woman, should allege that she has a separate estate subject to the charge sought to be enforced; and the execution can issue against that alone. *Ibid.*

10. A married woman can claim the same exemption from execution as she would be entitled to if she were a *feme sole*. *Ibid.*

MARSHAL, U. S.:

Deputy United States Marshals have no claim against the Government for their compensation, but must look to the Marshal therefor. Hence, an assignment by a Deputy Marshal of his claim for compensation against the Marshal is not a violation of § 3477, Rev. Stat. U. S. *Wallace* v. *Douglass*, 19.

MECKLENBURG CRIMINAL COURT:

Jurisdiction of, 364.

MINORS—SALE OF LIQUORS TO. See LIQUORS—SALE OF TO MINOR.

MORTGAGE:

1. A subsequent mortgagee, or purchaser of the equity of redemption, has the right to avail himself of the statute of limitations as a defence to the first mortgage, and after the rights of the first mortgagee are barred by the statute, no act or acknowledgment on the part of the mortgagor can revive the mortgage as to subsequent mortgagees or purchasers. *Hill* v. *Hilliard*, 34.

2. A subsequent mortgagee, or purchaser of the equity of redemption, can avail himself of the protection of the statute of limitations against a prior mortgagee, although the mortgagor is a party to the action and refuses to plead the statute. *Ibid.*

3. When, in an action to foreclose a mortgage on land belonging to a married woman, she alleged that her signature to the mortgage was obtained by fraud of the plaintiff, and fear and compulsion of her said husband, &c., it was competent for plaintiff to offer a deed executed by the *feme* and her husband, a year after the date of the mortgage, purporting to convey a part of the land embraced in the mortgage, for the purpose of paying a part of the mortgage debt, to rebut the testimony of the *feme* defendant tending to establish the truth of her allegations. *Edwards* v. *Bowden*, 50.

4. A mortgagor applied for an injunction to restrain the mortgagee from selling under the mortgage, alleging that the debt secured was usurious, and that he was entitled to sundry credits. The mortgagee denied the usury, but the issue on that plea was found against him: *Held*, that defendant was entitled to judgment for the amount actually due on the mortgage debt, with interest, and, under *The Code*, § 528, for costs. *Cook* v. *Patterson*, 127.

5. Mortgagee sold the mortgaged land, bought it himself, and entered into adverse possession in the life-time of mortgagor, *i. e.*, on January 1, 1874, which adverse possession has continued ever since. Mortgagor died January 1, 1883; there has never been any administration on his estate; in June, 1887, his *infant* heirs sued the mortgagee for redemption: *Held*, that the action is barred under *The Code*, §§ 152 (4), 148 and 168. *Frederick* v. *Williams*, 189.

6. Where a mortgagee takes adverse possession of, and rents out the mortgaged land, the payments of rent to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption. *Ibid.*

7. *The Code*, §§ 117-120, has no application in Courts of Justices of the Peace. *Comron* v. *Standland*, 207.

8. There is no statutory provision that allows a mortgage of real or personal property to be given *in lieu* of the undertaking on appeal from a Justice's judgment, required by *The Code*, §§ 883, 884. *Ibid.*

9. Although neither the Justice nor the plaintiff is required to accept a mortgage from the defendant *in lieu* of an undertaking on appeal, yet, if the defendant give and the plaintiff accept such mortgage, it is valid and can be enforced. The stay of the execution is a valuable and sufficient consideration to support the mortgage. *Ibid.*

10. No particular form is essential to the validity of a chattel mortgage; mere informality will not vitiate it. No seal is necessary. It is sufficient if the words employed express in terms or *by just implication* the purpose of the parties to transfer the property to the mortgagee, to be revested in the mortgagor upon the performance of the condition agreed upon, however informally expressed. A power of sale is not essential. *Ibid.*

11. A writing was entitled "A v. B: Undertaking on appeal from Justice's judgment"; it recited a judgment rendered against B, in favor of A, and the intention of B to appeal therefrom, and then provided as follows: "Now, therefore, for the purpose of securing the payment of all damages and costs which may be awarded against him, and so much of the judgment or any part thereof that may be affirmed, the said B does give the following articles of personal property" (describing the property). The writing was signed by B, but not sealed: *Held*, to be good as a chattel mortgage. *Ibid.*

12. Whether a writing, claimed to be a mortgage, is such or not, is a question of law, and should not be submitted to a jury. *Ibid.*

13. A mortgagor's purchase of the mortgaged land at a sale for taxes due by himself, is absurd and void, and will not affect the mortgagee's rights. *Ryan* v. *Martin*, 282.

14. A mortgage given under § 120 of *The Code, in lieu* of the bond required by § 237, may be foreclosed by motion, upon notice, in the original action. *Ibid.*

15. In a petition for dower, where the lands consisted principally of different parcels mortgaged in several deeds by husband and wife, the allotment, under § 2103 of *The Code*, should not be in part of the lands as if unincumbered or subject to same incumbrance, but in each parcel separately, and then the widow can

work out her relief by asserting her equity against each creditor, as he seeks to enforce his security. *Askew* v. *Askew*, 285.

16. Nor, in such case, should the widow be allowed the use for life in a specific sum of money in lieu of dower in a parcel of the mortgaged lands, not deemed susceptible of allotment by metes and bounds, but the allotment should be of one-third, for life, of the premises in value—her share being fixed by law, and not depending on estimates. *Ibid.*

MUNICIPAL CORPORATIONS: See CORPORATIONS, MUNICIPAL.

MURDER:

Where an officer had a warrant to arrest a man, and he thought it necessary to disarm the prisoner, and called upon a bystander to assist in disarming him, and thereupon the prisoner drew a pistol and killed such bystander: *Held*, to be a case of murder. *State* v. *McMahan*, 379.

NEGLIGENCE:

H. had a mill on a stream, and L. had a mill lower down on the same stream; both had dams across the stream. H. took out his dam, which caused the accumulated mud, &c., in his pond to fill up L.'s pond to such an extent as to back the water to the injury of H. L. was notified by H. to raise his flood-gates, so as to let the mud pass through when H.'s dam was removed, but L. refused to do so: *Held*, that H. could recover damages from L. caused by the back water, but L. could not recover for damages suffered by the filling up of his pond, because his refusal to open his flood-gates made him guilty of contributory negligence. *Hardin* v. *Ledbetter*, 90.

NEW TRIAL:

1. Granting a new trial, on the ground that the verdict is against the weight of the evidence, is a matter within the discretion of the Judge below, and not reviewable, unless it appears that the Judge was influenced in the exercise of such power by an erroneous view of the law. *Davenport* v. *Terrell*, 53.

2. If improper evidence is admitted after objection, but the ill effect which it might have is obviated by the Judge's charge, a new trial will not be ordered in this Court. *Hardin* v. *Ledbetter*, 90.

NUNC PRO TUNC—AMENDMENT, 411.

OATHS:

1. The oath prescribed for electors by *The Code*, § 2681, omits some of the essential requisites to voting contained in the Constitution, and is confined to those indispensable qualifications set out

in Article 6, § 1, of the Constitution. The oath does not extend to disqualifications incident upon conviction for crime. *State* v. *Houston*, 383.

2. Under *The Code*, § 2681, the voter swears to his possessing the qualifications of an elector. Under *The Code*, § 2684, he swears that he has not lost the right to vote by any provision of the Constitution or laws which takes that right from him. *Ibid.*

OFFICER:

1. That one acted as a public officer, and was known as such, is *prima facie* evidence of his official character; he is presumed to have been duly qualified, without producing his commission or appointment. *State* v. *McMahan*, 379.
2. The law confers on an officer charged with executing a process all the powers necessary for the purpose, and he is to judge what is necessary. *Ibid.*
3. Where an officer had a warrant to arrest a man, and he thought it necessary to disarm the prisoner, and called upon a bystander to assist in disarming him, and thereupon the prisoner drew a pistol and killed such bystander: *Held*, to be a case of murder. *Ibid.*

PARTIES:

1. Under *The Code*, § 422, a referee has power to admit new parties to an action. *Perkins* v. *Berry*, 131.
2. It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with the assent of the other. *Ibid.*
3. Where, in a creditor's bill against the personal representative, it is sought to have the lands of decedent sold for the satisfaction of the debts proven, the real representatives of decedent must be made parties, before any judgment subjecting the real estate can be entered. *Ibid.*

PARTNERSHIP:

1. When one partner buys goods for the firm, and they are used for partnership purposes, but he gives his individual note for the price, he is entitled to have the note paid out of the partnership assets. *Thornton* v. *Lambeth*, 86.
2. When one member of a firm buys goods on his own credit, without disclosing to the seller the fact that he is a member of a partnership, and the goods are used for partnership purposes, the firm is liable to the seller. In order to exempt the firm from liability, it must be shown that the seller knew of the partnership and elected to give credit to one partner alone. *Ibid.*

3. The executors of a deceased member of a firm sued the surviving partners for an account and settlement of the copartnership business. One of the defendants was allowed to testify that plaintiff's testator agreed with witness and the other partners upon a certain basis (which witness stated at length) for the adjustment of the affairs of the firm between the members thereof; and assented to a statement of each partner's interest in the firm, which appeared on the books of the firm: *Held*, that such testimony should have been ruled out upon plaintiff's objection, as it was incompetent under § 590, *The Code*. But the witness had a right to testify that the books alluded to were kept among the papers of the firm, that decedent had access to them, and that many of the entries were in his handwriting. *Armfield* v. *Colvert*, 147.

4. In the above case, the plaintiffs introduced one of the defendants as a witness, who stated, without objection on the part of the defendants, that plaintiffs' testator contributed a certain sum towards the copartnership capital: *Held*, that plaintiffs did not thereby open the door so as to permit defendants to testify as to other transactions between them and plaintiffs' testator. *Ibid.*

PAUPER APPEAL, 350.

PAYMENT:

1. The payment and acceptance of a less sum than is actually due, in compromise of the whole debt, is a complete and valid discharge, under *The Code*, § 574. And this is so, although the debt compromised was one contracted and reduced to judgment before § 574 became the law, if the compromise was made after § 574 was enacted. *Koonce* v. *Russell*, 179.

2. As, under § 574, the payment of a less sum where a greater is due, is not a discharge, unless voluntarily accepted as a compromise by the creditor, the section is not in conflict with Art. I, § 10, Const. U. S., in its application to pre-existing contracts. *Ibid.*

3. Laws existing at the date of a contract are deemed part of the contract. Therefore, a compromise, made since § 574 was enacted, is construed as if § 574 had been incorporated in its terms. *Ibid.*

4. While a sum, which has been carelessly, voluntarily and without reasonable inquiry, overpaid as a legacy or distributive share, before the settlement of an estate, cannot be recovered by an executor or administrator; but when an overpayment was made to a legatee after the settlement of the estate, from which it was due, not officiously and voluntarily, but by *mistake* (of fact), the sum overpaid can be recovered. *Lyle* v. *Siler*, 261.

PERJURY:

Where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been *convicted* of larceny in 1884, and the judgment suspended on such conviction: *Held*, that the indictment was properly quashed *State* v. *Houston*, 383.

PETITION TO REHEAR:

1. The decision in *Fry* v. *Currie*, 91 N. C., 436, re-affirmed. *Fry* v. *Currie*, 203.
2. The weightiest considerations make it the duty of the Court to adhere to its decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court. *Ibid.*
3. It is not sufficient merely that two members of the bar—who perhaps have not heard the argument, and may not have given the same careful consideration to the question decided as was given by the Court—are of opinion, and so certify, that the Court has committed an error. *Ibid.*
4. The practice does not admit of a simple repetition of an argument already heard, weighed, and passed upon after full deliberation. *Ibid.*
5. The statute (Acts 1794, 1 Pot. Rev., ch. 423) amendatory of the statute (Acts 1784, 1 Pot. Rev., ch. 202), rendered the lands acquired by this State by the treaty of Holston from the Cherokee Indians, subject to entry and grant. The judgment entered in this case at the September Term, 1888, of this Court, is set aside, and a new trial is ordered, because of the act of 1791 (Haywood's Manual, p. 188), which was not called to the attention of the Court when the case was first argued. *Brown* v. *Brown*, 221.

PLEADING:

1. Where, in an action, the defendant pleads sole seizin, he cannot after a verdict in favor of plaintiff, avail himself of a defence which would be in harmony with the verdict. *Allen* v. *Salinger*, 14.
2. The pendency of another action is a defence which must be set up in the answer, or in some way insisted on, before the trial on the merits, or it will be considered as waived. *Blackwell* v. *Dibbrell*, 270.

3. The plea of former judgment must be distinctly set up in the answer as new matter. It will not be considered as embraced under general denials of the allegations of the complaint. *Ibid.*

4. The complaint, in an action to enforce an executory contract of a married woman, should allege that she has a separate estate subject to the charge sought to be enforced; and the execution can issue against that alone. *Flaum* v. *Wallace*, 296.

5. Where all the defendants join in a demurrer to the complaint, upon the ground that it does not set forth a good cause of action, the demurrer will be overruled if the complaint sets forth a good cause of action as to *any one* of the defendants. *Conant* v. *Barnard*, 315.

6. The same defendants may demur to one and answer as to another of two or more causes of action in one complaint; or, as to a single cause of action, some defendants may answer and some may demur, and the issues of law will, in either event, be so raised as to require the Court to pass upon them. *Ibid.*

POLICE REGULATIONS OF AGRICULTURAL SOCIETIES. 416.

PRACTICE:

1. The Court has countenanced and approved the practice of defining, in the verdict, the extent of the plaintiff's interest in the land in controversy, either by metes and bounds, or as an undivided fractional interest. *Allen* v. *Salinger*, 14.

2. Under the present practice a memorandum, "general issue," entered on a Justice's docket as embracing defendant's defence, will be construed to mean nothing more than a general denial of plaintiff's cause or causes of action; hence, evidence of an estoppel by judgment, or of another action pending, is not admissible in support of such a defence. *Blackwell* v. *Dibbrell*, 270.

3. The objection, that a cause of action is not such as can be "split up" so as to bring it within the jurisdiction of a Justice, must be made before the Justice; otherwise it cannot be made in the Superior Court on appeal, unless the defendant is permitted to amend. *Ibid.*

4. Proper practice to be pursued when "another action pending" or "former judgment" is pleaded. *Ibid.*

5. The affidavit in a bastardy proceeding may be amended in the Superior Court, with the permission of the Judge, and there is nothing in the point that such amendments cannot be made, after the defects are pointed out by a motion to dismiss. *State* v. *Giles*, 391.

6. A brought an action of claim and delivery before a Justice of the Peace, and took the property from the defendant under the process of that Court. Upon the trial, the Justice ruled that he had no jurisdiction, made an order of restitution, and gave judgment in favor of the defendant for $150, as the value of the property in dispute, to be collected in the event the property was not restored. A then brought an action in the Superior Court to restrain the collection of the judgment for $150. A restraining order was denied him, and he paid the $150. Afterwards the Judge permitted A to amend his complaint so as to set up the payment of the $150, and demand judgment for same: *Held*, (1) that denial of restraining order was proper; (2) that as the $150 was not paid until after the action was brought, it was error to allow the amendment; (3) that the allowance of such amendment was also erroneous because it changed the action and made it substantially a new one; (4) that the demand for the $150 sounded in contract, and therefore the Superior Court had no jurisdiction of an action to recover it. *Powell* v. *Allen*, 46.

PRACTICE IN SUPREME COURT: See SUPREME COURT.

PRINCIPAL AND SURETY:

1. Plaintiff having been sued by the indorsee of his note, and judgment obtained against him, the indorser is sufficiently protected against his suretyship for plaintiff by a stay of execution of plaintiff's judgment against him, on his guaranty of the article for which the note was given, until plaintiff has satisfied the indorsee's judgment. *Baker* v. *Brem*, 72.

2. One who obtains possession of a negotiable paper, after indorsing it, is restored to his original position, and cannot hold intermediate parties who could look to him. It is equally true that one who derives possession of the paper from him, with notice of this fact, cannot hold such intermediate indorsers liable; and when such indorsements are in *blank*, oral testimony is admissible to show the relation in which they stand. *Adrian* v. *McCaskill*, 182.

3. The construction placed upon *The Code*, § 177, by *Harris* v. *Burwell* and *Martin* v. *Richardson*, is confined to the makers of promissory notes, and does not apply as between indorsers. *Ibid.*

4. The payee in a negotiable note indorsed it in blank and delivered it, before maturity, to McC. as a collateral. McC. also indorsed the note in blank before maturity, and delivered it to W. & Co. as collateral. McC. redeemed and took up the note from W. &

Co., before its maturity, and continued to hold it until *after its maturity*, when he returned it to the payee without erasing his (McC.'s) name as indorser. The *payee* then sold the note to plaintiffs for value. Plaintiffs had no actual notice of the former dealings and transactions connected with the note: *Held*, (1) that as plaintiffs derived their title directly from the original payee, who had re-acquired title, they could not hold the indorser McC.; (2) that plaintiffs were affected with, and bound by, notice of what appeared on the note itself, to-wit, that the person from whom they purchased was the payee and first indorser; (3) that the indorsement of McC., although in blank, could not have been filled up by plaintiffs with their own names, because, having purchased the note from the payee, whose indorsement was *prior* to McC.'s, it would have been a gross wrong, if not a fraud, upon McC.; (4) that plaintiffs could not hold McC. as an accommodation indorser or guarantor, because, having purchased the note after maturity, and with notice of its dishonor, the facts which discharged McC. could be set up as a defence. *Ibid.*

5. A collateral oral agreement, between the maker and accommodation indorser of a negotiable note, that it should be negotiated at bank, does not effect one who purchases the note, for value and before maturity, from the maker; and this is so, although the purchaser has notice of such agreement at the time he takes the note. *Parker* v. *Sutton*, 191.

6. The sureties to an undertaking, on behalf of the defendant, in claim and delivery, are not liable for any *debt* which plaintiff may recover in the action. *Hall* v. *Tillman*, 276.

7. Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by *The Code*, § 326 (as amended by ch. 5, § 32, Laws 1885) and § 431. *Ibid.*

8. The effect of the amendment to *The Code*, § 326, by ch. 50, § 2, Laws 1885, is to make the condition of the bond therein provided for harmonious with the judgment authorized by the law regulating proceedings in claim and delivery. *Ibid.*

PRISONS:

1. Under the Constitution, article 11, § 6, and *The Code*, § 3464, a city is liable in damages only for a failure to so construct its prison, or so provide it with fuel, bed-clothing, heating apparatus, attendance and other things necessary, as to secure to prisoners a reasonable degree of comfort, and protect them from

such actual bodily suffering as would injure their health. If the Aldermen of a city comply with the above requirements, the city is not liable in damages for sickness and suffering endured by a prisoner, and caused by the neglect of the *jailer, policemen or attendants*, to properly minister to his wants and necessities. *Moffitt* v. *Asheville*, 237.

2. The word *superintendence*, as used in the Constitution, article 11, § 6, was intended to impose upon the governing officials of municipal corporations the duty of exercising ordinary care, in procuring articles essential for the health and comfort of prisoners, and of overlooking their subordinates in immediate control of the prisoners, so far at least as to replenish the supply of necessary articles when notified that they are needed; and of employing such agents and appropriating such moneys as may be necessary to keep the prison in such condition as to secure the comfort and health of the inmates. *Ibid.*

3. Where window-glass in the window of a city prison has been broken and the bed-clothing furnished for its inmates has been destroyed, but the *governing officers* of the city are not shown to have had actual notice thereof, or to have been negligent in providing such oversight of the prison as would naturally be expected to give them timely information of its condition, there is not such a failure, in discharging the duties of construction or superintendence of the prison, as to subject the city to liability for injuries sustained by a prisoner by reason of the broken window, &c. *Ibid.*

4. *Semble*, that a city or town would be liable for retaining incompetent or careless jailers or servants, after notice of their character. *Ibid.*

PROCESS:

1. A party will not be permitted to take any advantage obtained by the abuse of legal process, nor will the courts permit the opposite party to be prejudiced thereby. *Powell* v. *Allen*, 46.

2. The courts will promptly enforce restitution of property taken by abuse of legal process, and will not proceed to administer the rights of the parties until such restitution is made. *Ibid.*

Officers executing process, 379.

PROCEEDINGS, SUPPLEMENTAL:

The maker of a note was examined in a supplemental proceeding, brought against the payee, and upon such examination admitted that he owed the payee the amount of the note. An order was made that a part of the money due on the note be paid to the plaintiffs in such proceeding, with which order the maker

complied. At the time the proceedings were commenced the payee in the note had already transferred it *bona fide*, and before maturity, to A, who was never made a party to the proceeding: *Held*, that A could recover from the maker, in a separate action, the full amount of the note, with interest and costs, as it was the maker's folly to admit owing the note to the payee before ascertaining whether the note had been negotiated; and A not being a party, all that was done in the supplemental proceeding was *res inter alios* as to him. *Rice* v. *Jones*, 226.

PUBLIC LANDS:

1. A grant of lands within the Cherokee Indian boundary is void. *Brown* v. *Brown*, 213.
2. It is the province of the legislative department to prescribe when, how, and for what purpose the lands of the State may be granted. In the absence of such legislation neither the Governor, Secretary of State nor any agency can pass title to State lands by grant or otherwise. *Ibid.*
3. A grant of lands *not subject to grant* is void and can be attacked collaterally. If the land granted *is subject to grant*, but the grant itself was obtained by fraud, or there were irregularities attending its issue, it cannot be attacked *collaterally*. *Ibid.*
4. The treaty of Holston between the United States and the Cherokee Indians did not have the effect to repeal or modify the entry laws of this State. *Ibid.*

PUBLIC OFFICER: See OFFICER.

QUANTUM OF PROOF:

Rule governing, in allegations of fraud, 1.

QUASHING:

1. Where an indictment charged the defendant with perjury, in that he swore, at the time he *registered as a voter*, that he was a duly qualified voter, whereas, at the time of taking such oath, the defendant was not a duly qualified voter, he having been *convicted* of larceny in 1884, and the judgment suspended on such conviction: *Held*, that the indictment was properly quashed. *State* v. *Houston*, 383.
2. Under the Constitution, Article 6, § 1, a person does not forfeit his rights as an elector by a mere verdict of guilty, or a confession, when indicted for a felony, &c.; but, in order that such forfeiture shall attach, such verdict or confession must be followed by a judgment of the Court against the accused. Where one is convicted of a felony, but the judgment is suspended, he does not forfeit his rights as an elector. *Therefore*, the indict-

ment in this case should have been quashed, because it appeared on its face that the judgment was suspended on the "conviction" charged in the bill. *Ibid.*

RAPE, ASSAULT WITH INTENT TO COMMIT:

1. Every indictment should charge *all* the essential elements of the offence intended to be charged; and when the *intent* with which an act is committed is one of the essential elements of the offence, the word "*intent*" should be used in the indictment, though possibly some equivalent expression would suffice in its stead. *State* v. *Goldston*, 323.
2. An indictment charging that the defendant did make an assault upon a female child under ten years of age, and did unlawfully *attempt* to carnally know her, &c., does not sufficiently charge an assault with intent to commit a rape, &c., under § 1102 of *The Code*. *Ibid.*
3. But such indictment sufficiently charges, and the defendant could be convicted of, a simple assault. *Ibid.*
4. An assault with intent to commit rape being a misdemeanor, in an indictment for the offence the defendant may be convicted on a single count of a simple assault; but it would be otherwise if the offence charged were a felony. *Ibid.*

RECORD:

When case remanded for defect in transcript of record, 411.
Presumption in favor of records, 261.

REFERENCE:

1. A referee admitted certain evidence, which was objected to, and made his report without ruling on the admissibility of such evidence. In the Superior Court there was an order of re-reference, in which the referee was expressly directed to rule upon the admissibility of the evidence objected to. The referee made another report, without passing on the evidence, and the defendant excepted: *Held*, that it was error to give judgment confirming the report without passing on the objection to the evidence, and that the Judge below could pass upon the competency of the evidence, without again recommitting the case to the referee. *Wallace* v. *Douglass*, 19.
2. The Supreme Court will not review the facts found by a referee, and adopted by the Judge below, in an action of claim and delivery. *Jordan* v. *Bryan*, 59.
3. Where the report of a referee designates certain claims which he finds to be valid against the defendant, as claims of "officers of the Court": *Held*, that such designation sufficiently points

out the Clerk to whom payment is to be made. *Perkins* v. *Berry*, 131.

4. Under *The Code*, § 422, a referee has power to admit new parties to an action. *Ibid.*

5. That the referee has not reported *all* the evidence taken during the trial before him is not a ground of *exception*. If all the evidence is not sent up, the remedy of the prejudiced party is by application to the Judge for an order directing the referee to send up that which has been omitted. *Ibid.*

6. Upon a trial before a referee, one of the parties objected to certain testimony as it was given in, but the referee did not then make a note of such objections, but at the end of the written evidence as taken down by him, he noted that the evidence in question had been objected to "in apt time": *Held*, that this was a sufficient noting of the objection, and from it the Court would assume that the objections were made as the evidence was offered. *Armfield* v. *Colvert*, 147.

REFEREE: See REFERENCE.

REMOVAL OF CAUSES FROM SUPERIOR TO CRIMINAL COURTS, 364.

RES GESTÆ:

Declarations of a prisoner, made after the crime was committed, in excuse or explanation of his acts, will not be received in evidence. Such declarations are competent only when they constitute part of the *res gestæ*. *State* v. *Ward*,

RESTITUTION:

The courts will promptly enforce restitution of property taken by abuse of legal process, and will not proceed to administer the rights of parties until such restitution is made. *Powell* v. *Allen*, 46.

ROANOKE AND TAR RIVER AGRICULTURAL SOCIETY: See AGRICULTURAL SOCIETIES.

SALE:

Where the terms of a sale of goods were, that the buyer should give notes for the price, but after the goods were delivered to him the buyer refused to give the notes: *Held*, that no sale was consummated by the delivery—there was only an agreement to sell, which was not perfected, and the seller could recover the goods from the buyer or from one to whom he had assigned them by a general assignment for the benefit of creditors. *Millhiser* v. *Erdmann*, 27.

SLANDER OF INNOCENT WOMAN:

1. In an indictment for slandering an innocent woman, under § 1113 of *The Code*, the defendant cannot show, on the plea of not guilty, a prevalent report of sexual intimacy between the prosecutrix and one C., the making of a charge of such intimacy being the defamatory matter specified in the indictment, to disprove its wanton and malicious utterance, though he might make such proof, after verdict of guilty, to the Court, in extenuation, &c. *State v. Hinson*, 374.
2. On such trial, it appearing on cross-examination of the prosecutrix that, the morning after the alleged criminal intercourse with C., she had, before hearing the report from her aunt, written to C. and sent the letter to him ten miles away by a messenger, a further question by the defendant, whether her aunt told her from whom she got the report: *Held*, inadmissible, in the absence of a suggestion as to the purpose for which the inquiry was made. *Ibid.*
3. Whether a witness is qualified to testify as an expert, is a question for the Court, and not reviewable; and the value of his testimony as such is for the jury to determine. Therefore, when a physician, upon evidence of his study and practice of his profession, was admitted as an expert to testify, as the result of his examination of the sexual organs of a woman, that she had never copulated with a man, an objection to the testimony, based upon the witness' inexperience as to the effect of such intercourse upon the organs of the female, could not be sustained. *Ibid.*
4. A woman who has never had actual sexual intercourse with any one is an *innocent woman*, within the meaning of § 1113 of *The Code*, even though she and a man were surprised in each other's embrace, about to commit the act of copulation, but before it took place. *Ibid.*

SLAVES—Descendants of, 109.

SOLE SEIZIN—Effect of Plea of, 14.

SPECIAL VERDICT: See Verdict, Special.

SPLITTING UP ACCOUNTS, 270.

STATUTES:

1. What is called the policy of the Legislature is too uncertain a ground upon which to found the interpretation of statutes, especially when the statutes are clear and absolute in their terms and expressed purpose. *Brown* v. *Brown*, 213.

2. It is more dangerous for this Court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished. *State* v. *Massey*, 356.

3. A later statute repeals, by implication, an older statute, with which it is irreconcilably inconsistent, to the extent of such repugnancy. But the two statutes must be reconciled if that can be done by any fair construction. *Ibid.*

4. When a criminal statute, or any part of it, which is essential to sustain an indictment, is repealed or stricken out by a later act, offences committed under the older statute cannot be punished, unless a contrary intent appear from an express saving clause in the repealing statute, or by necessary implication from its wording. *Ibid.*

5. The statute regulating the judgment in bastardy proceedings, by which a fine of ten dollars and the payment of fifty dollars for the support of the child are imposed upon the defendant, and he is imprisoned until he makes payment, is constitutional, as the defendant can be relieved of the imprisonment under the insolvent debtor's law (*The Code*, § 2067). *State* v. *Giles*, 391.

STATUTE OF LIMITATIONS: See LIMITATIONS, STATUTE OF.

STREAMS AND PONDS:

Rights of upper and lower proprietors, 90.

STREETS:

Towns may pass ordinances to improve, 403.

SUPPLEMENTAL PROCEEDINGS: See PROCEEDINGS, SUPPLEMENTAL.

SUPREME COURT:

1. The Supreme Court will not review the facts found by a referee, and adopted by the Judge below, in an action of claim and delivery. *Jordan* v. *Bryan*, 59.

2. A motion will not be entertained in the Supreme Court to allow an appellant to file a record of proceedings subsequent to the appeal, and independent of it, for the purpose of making a case here substantially different from the one tried in the Court below, nor will the case be remanded for a like purpose. *Whitehead* v. *Spivey*, 66.

3. Although an appeal before any judgment is rendered below is premature, and will be dismissed, yet, when it appears that a decision by this Court of the point intended to be raised by the appeal will practically terminate the action, the opinion of the Court will be given. *Thornton* v. *Lambeth*, 86.

4. The decision in *Fry* v. *Currie*, 91 N. C., 436, re-affirmed. *Fry* v. *Currie*, 203.

5. The weightiest considerations make it the duty of the Court to adhere to its decisions. No case ought to be reversed upon petition to rehear, unless it was decided hastily and some material point was overlooked, or some direct authority was not called to the attention of the Court. *Ibid.*

6. It is not sufficient merely that two members of the bar—who perhaps have not heard the argument, and may not have given the same careful consideration to the question decided as was given by the Court—are of opinion, and so certify, that the Court has committed an error. *Ibid.*

7. The practice does not admit of a simple repetition of an argument already heard, weighed, and passed upon after full deliberation. *Ibid.*

8. The presumption is in favor of the regularity and correctness of the proceedings below, and error will not be presumed unless it is assigned and shown. Therefore, when it appears from the record, that, upon affidavit, the plaintiff obtained an order for service, by publication of summons, on a non-resident defendant, and that there was affidavit of the publisher of a newspaper that publication was made, this Court will not presume any defect in the service, in the absence of assignments specifying the particular defects here insisted on. *Lyle* v. *Siler*, 261.

9. The refusal by the Judge below to permit an amendment is unreviewable. *Blackwell* v. *Dibbrell*, 290.

10. The Court below may require the grounds of objection to testimony to be stated. If, after being required by the Court to state his objections, a party refuse so to do, his exceptions shall avail him nothing in this Court. *State* v. *Wilkerson*, 337.

11. Where the examination of a witness is taken down in writing by a committing Magistrate, and afterwards read in evidence on the trial in the Superior Court, the defendant objecting, and it does not appear from the record and statement of the case on appeal whether the witness signed the examination or not, it will be presumed in this Court that the witness did sign, and that the Magistrate complied with the duties imposed upon him by the statute. *Ibid.*

12. An affidavit, upon which is founded an order allowing a convicted person to appeal, *in forma pauperis*, under *The Code*, § 1235, is fatally defective if it does not state that the application is in good faith. Such averment is not required in civil cases under *The Code*, §§ 552, 553. *State* v. *Tow*, 350.

13. If an order is made allowing a defendant to appeal as a pauper, and the affidavit and certificate of counsel are not in the record sent to the Supreme Court, it will be presumed that they were in due form; but if they are sent up, and are not in due form the appeal will be dismissed on motion of the appellee. *Ibid.*

14. It is more dangerous for this Court to usurp the powers of the legislative department by supplying omissions in, or putting strained constructions upon, criminal statutes, than that some criminals should go unpunished. *State* v. *Massey*, 356.

15. The transcript of the record sent to this Court in a State case, failing to show that a Court was held by a Judge at the time and place prescribed by law, that a grand jury was drawn and sworn and presented the indictment, that the plea of not guilty was formally entered, is fatally defective, and the Court will not proceed to decide the question presented in the assignment of error, but will remand the case, that the record may be perfected. *State* v. *Farrar*, 411.

16. Where no exceptions are made below, and no error is apparent upon the record, the judgment will be affirmed. *State* v. *Bell*, 438.

History of Supreme Court of North Carolina, 441.

SURETY: See PRINCIPAL AND SURETY.

TENANT IN COMMON:

1. If one tenant in common sue his co-tenant for possession, the action will be dismissed if it is shown that plaintiff's rights were not denied, and he had given no reasonable notice to his co-tenant of his demand to be admitted to joint possession; but where the defendant in such an action, by his answer, denies the plaintiff's title, he thereby admits an ouster, and the action lies. *Allen* v. *Salinger*, 14.

2. Where, in such an action, the defendant pleads sole seizin, he cannot, after a verdict in favor of plaintiff, avail himself of a defence which would be in harmony with the verdict. *Ibid.*

3. Plaintiff claimed title to the whole of a tract of land of which he alleged that defendant was in possession; defendant denied being in possession of any land belonging to plaintiff. One of the issues submitted to the jury was: "Is plaintiff the owner of the land described in complaint?" To which the jury responded: "Yes; one-seventh of the Sandy Bottom tract—160 acres." The jury also found in response to another issue, that defendant was in possession of the land: *Held*, (1) that an objection by the defendant, that the finding of the jury on the first issue was not

responsive, was not tenable; (2) that a judgment that plaintiff recover the whole land was erroneous; the judgment should have been that plaintiff recover, and be let into possession with defendant as tenant in common, to the extent of a one-seventh interest. *Ibid.*

TITLE, COLOR OF, 54.

TOWN ORDINANCES:

1. The charter of a town authorized its commissioners to adopt ordinances and regulations "for the improvement of the streets." The town commissioners passed an ordinance requiring all male citizens, between the ages of eighteen and forty-five years, to work a certain number of days on the streets, and imposing a fine or imprisonment for wilful refusal so to do: *Held*, that such ordinance is valid, and a violation of it was a misdemeanor, within the jurisdiction of the Mayor of the town, under *The Code*, §§ 3818, 3820. *State* v. *Smith*, 403.
2. All towns have the right to enforce such ordinances as the above, unless inconsistent with their charters, by virtue of *The Code*, §§ 3803, 3827. *Ibid.*

TROVER, ACTION IN NATURE OF, 266.

USURY:

1. A mortgagor applied for an injunction to restrain the mortgagee from selling under the mortgage, alleging that the debt secured was usurious, and that he was entitled to sundry credits. The mortgagee denied the usury, but the issue on that plea was found against him: *Held*, that defendant was entitled to judgment for the amount actually due on the mortgage debt, with interest, and, under *The Code*, § 528, for costs. *Cook* v. *Patterson*, 127.
2. One who goes into a court of equity to seek relief from a usurious contract, will be required to pay legal interest, which, under *The Code*, § 3836, is eight per cent., if the contract is to pay that rate. *Ibid.*

VARIANCE:

If an indictment for murder charge that the killing was done with a piece of plank, and the proof is that it was done with a piece of iron, the variance is not necessarily fatal. The rule on this subject laid down in *State* v. *Gould*, 90 N. C., 658, is correct. *State* v. *Weddington*, 364.

VERDICT:

A general verdict of guilty on an indictment containing two counts, one for larceny, the other for receiving, is valid, although the

jury were instructed to return a verdict of "guilty on the *second* count," if satisfied, &c., from the evidence on the part of the State. *State* v. *Allen*, 433.

VERDICT, SPECIAL:

A special verdict should find all the facts material to the determination of the issues raised by the pleadings, and if it fails to find any material fact it should be set aside and a new trial ordered. *State* v. *Oakley*, 408.

VOTERS: See ELECTORS.

WAIVER:

The pendency of another action is a defence which must be set up in the answer, or in some way insisted on, before the trial on the merits, or it will be considered as waived. *Blackwell* v. *Dibbrell*, 270.

Of lien by landlord, 59.

WARRANTS:

The Superior Court has power to *amend*, after verdict, a warrant brought by appeal of defendant from a Justice's Court, charging defendant with going upon the land of another, after being forbidden to do so, so as to charge that the entry was "wilful and unlawful," and to make the charge conclude, "against the peace and dignity of the State." *State* v. *Smith*, 410.

WATER-COURSES:

1. The classifications of water-courses, and the respective rights of individuals and the public therein, as defined in *State* v. *Glen*, 7 Jones, 321, is approved. *McLaughlin* v. *Mfg. Co.*, 100.

2. A stream which has not been used for navigation by boats, but only for rafting timber, turpentine, &c., *down* the stream, comes within the third class, as defined in *State* v. *Glen*. *Ibid.*

3. Authority over streams, conferred upon County Commissioners by ch. 56, vol. 2, *The Code*, while it stands and is unimpeached by allegations of fraud or other illegal conduct, is a bar to the remedy by injunction. Therefore, a defendant will not be restrained from erecting a dam across a stream, when he is proceeding under the permit and direction of the Commissioners. *Ibid.*

WIDOW:

1. A homestead, whether laid off to a husband in his life-time, or to his widow (there being no children), after his death, cannot be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. *Tucker* v. *Tucker*, 170.

2. In a proceeding by an administrator against the non-resident widow of a decedent who had not, for several years after his death, applied for letters of administration, she cannot be heard to say that the letters granted to the plaintiff were void, because she was the widow and had not waived her right to administer; at most, the appointment was only voidable and could be attacked only by a direct proceeding to remove the plaintiff. *Lyle* v. *Siler*, 261.

WILL:

1. A witness to a will assumes a serious duty and legal relation thereto, *necessary* to its validity if there be but two witnesses, and an *important* one, however many there may be. The witness cannot rid himself of this duty for any cause, at his will and pleasure, certainly not without the testator's consent, given in his life-time. Having subscribed as a witness, he is held by law to such relation and the legal consequences of it. *Boone* v. *Lewis*, 40.

2. To be held as a witness to a will it is essential that the subscriber consent to be such, and that he sign in the presence of the testator. *Ibid.*

3. Where one signs his name on a will in the place where the subscribing witnesses usually sign, there is a presumption that he signed as a subscribing witness, but the contrary may be shown. *Ibid.*

4. Where there was written, at the bottom of a will, "Witness, A B, C $\underset{\text{mark.}}{\overset{\text{his}}{\times}}$ D, E F," and E F was a devisee in the will: *Held*, that it was competent to show that E F signed as a witness to the mark of C D, and did not sign in the presence of the testator, or, at his request, become a subscribing witness to the will itself. *Ibid.*

5. One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. *The Code*, § 2147. *Ibid.*

6. J. B., being life tenant, devised the lands, with parts of other tracts he owned, to his wife for life, and then to P. B., one of his seven sons, to be by him "enjoyed during his natural life, without impeachment of waste," and after his death "to the children of my son who may be living at his death, to them and their heirs" *per stirpes*, and P. B. and his mother having taken possession of the lands, conveyed by deed of bargain and sale the land in dispute, with others, to one B. B. in fee with

warranty: *Held*, in an action by the children of P. B. against the defendants, who were in possession and claimed through the deed to B. B., that the plaintiffs were entitled to recover. *Brown* v. *Ward*, 173.

7. P. B. having *elected* to take under the will of his father J. B. the full estate for his own life, in the land to which he was entitled to a fractional interest only under the deed of his grandfather, W. B., could not repudiate the will of J. B. in so far as it gave the remainder after his death to his surviving children. *Ibid.*

8. When one disposes by will of the absolute right in property in which he has a limited interest only, he necessarily shows an intention to extinguish all other conflicting adverse rights, whether vested or contingent. *Ibid.*

WITNESS:

1. A witness to a will assumes a serious duty and legal relation thereto, *necessary* to its validity if there be but two witnesses, and an *important* one, however many there may be. The witness cannot rid himself of this duty for any cause, at his will and pleasure, certainly not without the testator's consent, given in his life-time. Having subscribed as a witness, he is held by the law to such relation and the legal consequences of it. *Boone* v. *Lewis*, 40.

2. To be held as a witness to a will it is essential that the subscriber consent to be such, and that he sign in the presence of the testator. *Ibid.*

3. Where one signs his name on a will in the place where the subscribing witnesses usually sign, there is a presumption that he signed as a subscribing witness, but the contrary may be shown. *Ibid.*

4. Where there was written, at the bottom of a will, "Witness, A B, C $\overset{\text{his}}{+}$ D, E F," and E F was a devisee in the will: *Held*, that it was competent to show that E F signed as a witness to the mark of C D, and did not sign in the presence of the testator, or, at his request, become a subscribing witness to the will itself. *Ibid.*

5. One who signs his name on a will in the place where subscribing witnesses usually sign, is not deprived of benefits conferred upon him by the will, if he, in fact, did not sign as a subscribing witness. *The Code*, § 2147. *Ibid.*

6. When a general objection is made, either to the competency of a witness or to the reception of testimony, the party objecting may avail himself of any grounds that may exist in support of

his contention, but in the case of testimony, if only part of it is incompetent, the exception will not be entertained if the evidence is severable. *State* v. *Wilkerson*, 337.

7. An impeached witness may be supported by showing previous consistent statements made by him. *State* v. *Ward*, 419.

WITNESS FEES:

A county is discharged from liability for a witness' fees by paying them to the person who appears to be entitled thereto, from the witness ticket and bill of costs made out by the Clerk of the Court, although the Clerk of the Court had notice that the claim had been assigned by the witness to another person, C. *Therefore*, upon an indictment against the witness for obtaining the county order, issued in payment of his fees, by false pretence, it was proper to charge in the bill that the act was done with intent to defraud C. *State* v. *Hargrave*, 328

This book must
not be taken
from the building